Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1994

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, *Petitioner*

v.

MALONE FREIGHT LINES, INC.,
QUANTUM SERVICES, INC., AND
TAMMY HIBSHMAN, AS THE PERSONAL REPRESENTATIVE
OF THE ESTATE OF BRIAN HIBSHMAN, DECEASED, *Respondents*

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHEN DOES FEDERAL REGULATION OF WARNING DEVICES AT RAILROAD GRADE CROSSINGS PRE-EMPT A RAILROAD'S COMMON LAW TORT DUTY TO IDENTIFY AN ALLEGEDLY HAZARDOUS CROSSING AND SELECT AND INSTALL ADDITIONAL WARNING DEVICES?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, St. Louis Southwestern Railway Company ("Railway"),[1] respectfully requests that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this case on November 4, 1994.

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[1] Railway's parent company is Southern Pacific Transportation Company. Railway has no subsidiaries, but owns capital stock in The Alton & Southern Railway Company, Arkansas & Memphis Railway Bridge and Terminal Company, Kansas City Terminal Railway Company, Southern Illinois and Missouri Bridge Company, Terminal Railroad Association of St. Louis and TTX Company.

OPINIONS BELOW

The Eighth Circuit's opinion is reported at 39 F.3d 864 (1994). The opinion is also reprinted in Appendix A to this petition. The Order of the District Court is not reported. It is reprinted in Appendix B. The Eighth Circuit's Order denying Railway's petition for rehearing and suggestion for rehearing en banc is reprinted in Appendix C. The Eighth Circuit's Orders staying the Court of Appeals' mandate pending this petition are reprinted in Appendix D.

JURISDICTION

A panel of the Eighth Circuit Court of Appeals decided this case on November 4, 1994. The panel reversed the District Court's decision granting summary judgment to petitioner Railway. The Court of Appeals denied Railway's petition for rehearing and suggestion for rehearing en banc on December 28, 1994. The Hon. C. Arlen Beam, Circuit Judge, voted to grant the suggestion for rehearing en banc. On Railway's motions, the Court of Appeals stayed its mandate until March 28, 1994, pending the filing of this petition for certiorari.

CONSTITUTIONAL PROVISION, STATUTE, AND FEDERAL REGULATIONS INVOLVED

▪ The United States Constitution states in Article VI, Clause 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land;

▪ Section 101 of the Federal Railroad Safety Act, formerly at 45 U.S.C. §421 and now at 49 U.S.C. §20101, provides as amended:

> The purpose of this chapter is to promote safety in every area of railroad operations and to reduce railroad-related accidents and incidents.

▪ Section 205 of the Federal Railroad Safety Act, formerly at 45 U.S.C. §434 and now at 49 U.S.C. §20106, provides as amended:

> Laws, rules, regulations, orders and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, rule, regulation, order, or standard related to railroad safety until such time as the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of such State requirement.

▪ The current federal regulations concerning adequate warning devices at railroad-highway safety projects, 23 C.F.R. 646.214 (1994), provide:

(3)(i) Adequate warning devices, under §646.214 (b)(2) or on any project where Federal-aid funds participate in the installation of the devices are to include automatic gates with flashing light signals when one or more of the following conditions exist:

(A) Multiple main line railroad tracks.

(B) Multiple tracks at or in the vicinity of the crossing which may be occupied by a train or locomotive so as to obscure the movement of another train approaching the crossing.

(C) High Speed train operation combined with limited sight distance at either single or multiple track crossings.

(D) A combination of high speeds and moderately high volumes of highway and railroad traffic.

(E) Either a high volume of vehicular traffic, high number of train movements, substantial numbers of school buses or trucks carrying hazardous materials, unusually restricted sight distance, continuing accident occurrences, or any combination of these conditions.

(F) A diagnostic team recommends them.

(ii) In individual cases where a diagnostic team justifies that gates are not appropriate, FHWA may find that the above requirements are not applicable.

(4) For crossings where the requirements of §646.214(b)(3) are not applicable, the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency, and/or the railroad, is subject to the approval of FHWA.

▪ The Federal Railroad Administration recently gave notice of a proposed rulemaking on the selection and installation of grade crossing warning systems. The regulations, 41 Fed. Reg. 11,649 (to be codified at 49 C.F.R. §234.301-303) (proposed March 2, 1995), are reprinted in Appendix E to this petition.

STATEMENT OF THE CASE

This is a federal pre-emption case. The question presented is: when does federal regulation of warning devices at railroad grade crossings pre-empt a railroad's common law tort duty to identify an allegedly hazardous crossing and select and install additional warning devices? That question arises on the following undisputed facts.

In late June 1990, the Federal Highway Administration (FHWA) approved a plan developed by the Arkansas Highway and Transportation Department (AHTD) to upgrade the existing warning devices where

U. S. Highway 79 crosses Railway's track near Proctor, Arkansas. The upgrade called for gates to be added to existing flashing lights at the crossing, and for the 8" lens on the flashers to be replaced with 12" lens. The FHWA-approved upgrade plan was the fruit of a diagnostic team's evaluation of the crossing, preliminary engineering work done by Railway at AHTD's request, and AHTD's ultimate recommendation of improved warning devices to FHWA. Immediately after the diagnostic survey, and at AHTD's request, Railway installed the larger flasher lenses. AHTD made no request for expedited installation of the crossing gates. Instead, work on that part of the upgrade proceeded on the normal course. Railway began work on the rest of the upgrade after AHTD authorized it to do so (upon FHWA approval of the whole project) in early July 1990. Before construction of the gates was completed, however, in June 1991 a tractor-trailer driven by Brian Hibshman collided with one of Railway's trains at the crossing. Hibshman was killed; Railway's locomotives and crossing were heavily damaged.

Railway sued the tractor-trailer's lessee, Malone Freight Lines, Inc., the tractor-trailer's owner, Quantum Services, Inc., for the damages to Railway's train and crossing. Hibshman's widow, in turn, sued Railway. The cases were consolidated for trial.

Respondents all asserted common law claims against Railway, alleging that the warning devices at the crossing at the time of the accident were inadequate. Railway moved for partial summary judgment on those

claims based on this Court's decision in *CSX Transportation v. Easterwood*, 113 S.Ct. 1732 (1993). *Easterwood* held that if federal regulations defining adequate warning devices cover a particular crossing, then state law—including a railroad's common law duty to maintain reasonable warning devices—is pre-empted. 113 S.Ct. at 1738, 1740-41. Railway argued that the FHWA's approval of the U. S. Highway 79 upgrade project, and the resulting immediate obligation of federal funding, triggered federal pre-emption many months before this accident.

The District Court, Magistrate Judge John F. Forster Jr. sitting by consent, agreed and granted summary judgment. *See Appendix B.* The other parties appealed. A panel of the United States Court of Appeals for the Eighth Circuit filed an opinion, *see Appendix A*, on November 4, 1994, reversing the District Court. The panel held that federal pre-emption does not occur until a federally approved and funded crossing upgrade has been completely installed. *Appendix A-5—A-6.* Railway petitioned for rehearing and suggested rehearing en banc. The Eighth Circuit denied Railway's petition and suggestion on December 28, 1994. One Circuit Judge, the Hon. C. Arlen Beam, voted to grant Railway's suggestion for rehearing en banc. *Appendix C-1.* The Court of Appeals stayed its mandate until March 28, 1995, pending the filing of this petition for certiorari. *Appendix D1—D-2.*

REASONS FOR GRANTING THE WRIT

1. *Malone* Creates a Conflict Among the Federal Circuits.

The Eighth Circuit's decision conflicts with the law in the Tenth and Seventh Circuits on railroad pre-emption. The Tenth Circuit, in a series of cases decided before this case was briefed, held that *Easterwood* and the applicable federal regulations require pre-emption when there is "significant federal participation" in an upgrade project. Approval of an upgrade, and the obligation of federal funds implicit in that approval, is, the Tenth Circuit holds, significant federal participation triggering pre-emption. *Hatfield v. Burlington Northern Railroad Co.*, 1 F.3d 1071, 1072 (10th Cir. 1993), *on remand*, 848 F.Supp. 158, 159 (D. Kan 1994)[2]; *Armijo v. Atchison, Topeka and Santa Fe Railway Co.*, 19 F.3d 547, 551 (10th Cir. 1994).

The Eighth Circuit's opinion brushed aside this authority with the comment that "[t]hese cases are either factually distinguishable or contrary to *Easterwood.*" *Appendix A-5.* The Eighth Circuit, in fact, neither distinguished the Tenth Circuit's position nor showed how it was contrary to *Easterwood.* Further, the Eighth Circuit failed to articulate any good reason for creating a conflict

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[2]The District Court certified and the Tenth Circuit accepted an interlocutory appeal in *Hatfield.* The case has been briefed and argued orally. A decision is imminent.

among the circuits on this important point of law.

The reasoning of a recent Seventh Circuit case also contradicts the Eighth Circuit's decision in this case. *Shots v. CSX Transportation, Inc.*, 38 F.3d 304 (7th Cir. 1994), holds that a federal decision about what warning devices are adequate for a particular crossing creates pre-emption. 38 F.3d at 307-308. While reasoning to that conclusion, Chief Judge Posner noted that the key to pre-emption was the Secretary of Transportation's (actually the Secretary's agent, FHWA's) decision regarding a given crossing. 38 F.3d at 307. The Seventh Circuit did "not doubt that the Secretary can approve a warning device before or after its installation . . . [.]" According to the Seventh Circuit, federal pre-emption of common law claims turns on whether "the Secretary has determined the devices to be installed" at a particular crossing. 38 F.3d 308 (quoting *Easterwood).* Railway's petition for rehearing and suggestion for rehearing en banc rested in part on *Shots,* which was decided while this case was under submission to the Eighth Circuit.

The rationale of *Hatfield* and *Shots* echoes Railway's position in this case: at the very latest, federal approval of a crossing warning devices upgrade project triggers pre-emption and obligates federal funding. Railway's view is faithful to the federal regulations, to the Federal Railroad Safety Act, and to *Easterwood.* The basic consistency of *Hatfield* and *Shots,* moreover, casts doubt on the Eighth Circuit's contrary decision in this case. The Court of Appeals for the Eighth Circuit unnecessarily

created a conflict among the circuits by rejecting the *Hatfield/Shots* understanding of the law. That conflict is especially troubling in light of the Federal Railroad Safety Act's mandate for establishing nationally uniform law for railroad safety. 49 U.S.C. §20106 (1994) (as amended, this section formerly at 45 U.S.C. §434.[3]

2. *Malone* Misreads this Court's Decision in *Easterwood.*

Federal approval of a crossing upgrade project triggers federal pre-emption. That federal blessing is the key pre-emption event. Federal pre-emption springs from federal action, not implementation of federal action by construction workers. In rejecting that basic understanding of federal pre-emption law, the Eighth Circuit assumed that in *Easterwood* the FHWA approved an upgrade project that was later abandoned. Since there was no pre-emption in *Easterwood*, the Court of Appeals reasoned, federal approval must not be the key to pre-

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[3] The lower federal courts are already caught on the horns of the legal dilemma created by the conflict between *Malone,* on the one hand, and *Hatfield* and *Shots* on the other. In *Thiele v. Norfolk Southern Railway Company,* 1994 W.L. 706174 (N.D. Ind.), the District Court noted the incompatibility of these decisions and considered the merits of each rationale. The *Thiele* Court rejected *Malone* and followed *Hatfield* and *Shots* as the better rule of law, holding that federal approval of a crossing upgrade pre-empts state common law. 1994 W.L. 706174 at *7. *Thiele* is currently on appeal to the Seventh Circuit. Briefs will soon be filed.

emption. *Appendix A-4.*

Not so. The Eighth Circuit mistakenly assumed federal approval of the *Easterwood* project. Neither this Court's *Easterwood* opinion nor the record in that case documents federal approval of the Cook Street project. All three federal court opinions in *Easterwood* show only that the Georgia Department of Transportation—not FHWA—approved the project and earmarked funds. *Easterwood*, 113 S.Ct. at 1741-42; *Easterwood v. CSX Transportation, Inc.*, 933 F.2d 1548, 1555-56 (10th Cir. 1991); *Easterwood v. CSX Transportation, Inc.*, 742 F.Supp. 676, 678-79 (N.D. Ga. 1990). Contrary to the Eighth Circuit's conclusion, the Supreme Court's decision simply does not establish that FHWA "had approved the upgrade plan" for the Cook Street crossing in *Easterwood. Appendix A-4.* At no point did this Court state that the one crossing project at issue in *Easterwood* had received "federal" approval—with good reason, the record would not support that statement.

The Eighth Circuit was likewise mistaken in concluding that "federal funds were set aside for the plan" and then later "reallocated." *Appendix A-3.* The *Easterwood* Court, it is true, spoke of funds being "set aside" and "earmarked." 113 S.Ct. at 1741-42. At no point, however, did the Supreme Court characterize the Cook Street crossing funds as "federal" funds. Neither the *Easterwood* opinions nor the record in that case, moreover, reflect the obligation of federal funds for the Cook Street crossing project.

The Court of Appeals opinion in this case is thus built on a faulty assumption: *Easterwood* did not involve a federally approved and federally funded project for upgrading the warning devices at the Cook Street crossing. A close reading of the *Easterwood* opinions demonstrates that the Georgia Department of Transportation was the only governmental agency doing the planning, approving, and earmarking of funds for the Carter Street crossing project. The pre-emption trigger had not yet been pulled by the federal government.

Easterwood, therefore, supports Railway's understanding that federal approval of a crossing upgrade creates pre-emption. Nothing more is required. Federal funding follows federal approval as a matter of course. And without federal approval there is no federal funding of crossing upgrades. 23 C.F.R. §646.210(b)(3) and (4) (1994). The Eighth Circuit's opinion—based on a misreading of *Easterwood* to the contrary—should not stand.[4]

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[4] *Malone* is unfaithful to *Easterwood* in one other way. It is undisputed that, before the accident in this case, a federally approved and funded warning device—larger flasher lenses—was installed by Railway at the U. S. Highway 79 crossing. *Appendix B-2.* Under *Easterwood*'s rationale, that installation could create pre-emption. 113 S.Ct. at 1741-42. The Court of Appeals in this case, however, rejected that possibility while mistakenly noting that flasher lenses are not warning devices pursuant to federal regulations. *Compare, Appendix A-6, with* 23 C.F.R. §646.204(j) (1994) (defining "active warning devices" such as "flashing light signals").

3. *Malone* Conflicts with Proposed Federal Regulations on Railroads' Duties at Grade Crossings.

The respondents' inadequate-warnings claims boil down to a question of priorities. They claim that the alleged hazards at the U. S. Highway 79 grade crossing should have been identified and corrected sooner with the installation of gates. Railway, respondents contend, should be held accountable through this common law negligence action for not upgrading the warning devices sooner. Respondents' view, however, overlooks the regulatory background and allocation of decision-making power that determined when and how the U. S. Highway 79 grade crossing should be upgraded. *E.g.*, Highway Safety Improvement Program, 23 C.F.R. §924 (1994). AHTD and FHWA—not Railway—evaluated and ranked the hazards at this crossing, decided its priority for an upgrade, and directed Railway when and how to implement the upgrade.

Recently proposed federal regulations, 41 Fed. Reg. 11,649 (March 2, 1995), make plain that state highway and transportation departments (such as AHTD) and FHWA—not railroads—decide when and how to improve grade crossing safety. *Appendix E* According to the Secretary of Transportation, that is the current regulatory system. And under the proposed regulations, that system will continue. 41 Fed. Reg. at 11,649-51, *Appendix E-4—E-7, E-10—E-15.* Dispelling any lingering doubt about the preemptive effect of the current and proposed regulations,

the Secretary explicitly noted that the proposed regulations would " 'substantially subsume' the subject matter of railroads' selectin and installation of highway-rail grade crossing warning systems . . . " thus pre-empting state common law. 41 Fed. Reg. at 11,651. *Appendix E-13–E-14*

The Secretary's interpretation of his department's regulations is, according to this Court, entitled to great deference. *E.g., Thomas Jefferson University v. Shalala*, 114 S.Ct. 2381, 2386-87 (1994); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). The Court of Appeals decision in *Malone*, however, sanctions state common law tort suits against railroads wherein juries are invited to second guess these regulatory decisions. That is not the Congress' intent as exemplified in the Secretary of Transportation's current and proposed regulations. In addition to rectifying *Malone*'s lack of fidelity to *Easterwood*, granting certiorari in this case would allow this Court to revisit this important question—who prioritizes grade crossing improvements?—in light of the Secretary's most recent word on the pre-emptive effect of the comprehensive scheme of federal grade crossing regulations.

The Secretary's current regulations at 23 C.F.R. §924 establish the criteria for the evaluation of grade crossing hazards, the prioritization for correcting those hazards, and the implementation of safety improvements to correct them. 23 C.F.R. §§924.9, 924.11 (1994). Among other things, states must consider the potential safety gain from improvements, the cost of projects, and the relative

hazards across all crossings in the state. 23 C.F.R. §924.9(4) (1994). Based upon this evaluation, states must develop an ongoing plan to eliminate continually the greatest hazards with the limited federal highway funding available. 23 C.F.R. §924.11 (1994).

Against this regulatory background, AHTD evaluated the hazards at the U. S. Highway 79 crossing and implemented improvements—improvements respondents now argue that Railway alone should have decided upon and implemented sooner. This is the administrative process for systematically and rationally improving grade crossing safety that the Secretary has now indicated was intended all along to substantially subsume railroads' common law duties to identify and improve hazardous crossings.

In *Easterwood*, this Court considered briefly whether the federally mandated and state-driven process under 23 C.F.R. §924 (1994) of prioritizing grade crossing hazards, and implementing that prioritization by eliminating the greatest hazards, pre-empted state common law. *Easterwood*, 113 S.Ct. at 1739-40. This Court felt that those regulations, rather than pre-empting state law, only "establish[ed] the general terms of the bargain between the federal and state governments. The State may obtain federal funds if they take certain steps to ensure that the funds are sufficiently spent." *Id.* at 1739. On the *Easterwood* record, this Court concluded that it was "not prepared to find pre-emption based solely on the strength of the general mandates of 23 C.F.R. pt. 924." *Id.* at 1740.

Since *Easterwood* did not involve a prioritization issue, that conclusion was well founded. Unlike respondents in this case, Mrs. Easterwood did not directly attack the Georgia Department of Transportation's decision about *when* gates should have been installed. In *Easterwood*, the upgrade project was completed. In that case the question, then, was whether the devices installed at the Cook Street crossing were federally approved and funded. In this case, on the other hand, respondents' claim centers on the priority given to a crossing upgrade by AHTD. Respondents' essential claim is this: Railway was negligent for not undertaking and completing the project to add gates and larger flasher lenses to the U. S. Highway 79 crossing sooner.

This case thus squarely presents the issue only hinted at in *Easterwood:* when does federal pre-emption of a railroad's common law duties to evaluate the adequacy of warning devices and upgrade existing devices occur? Following *Easterwood*, the Tenth and Seventh Circuits hold that pre-emption occurs when the FHWA approves an upgrade project and obligates federal funding. In *Malone*, on the other hand, the Eighth Circuit required an upgrade project be "installed and operating" before pre-emption occurs. *Appendix A-6.* Standing alone, that inter-circuit conflict counsels this Court to grant certiorari and announce a definitive interpretation of its *Easterwood* decision.

The Secretary's proposed regulations likewise support issuing the writ. Those regulations counsel this

Court to revisit the planning, evaluation, and prioritization process mandated by 23 C.F.R. §924 (1994). As the Secretary has now made clear, the federal decision to systemize crossing upgrades established in those comprehensive regulations actually displaced state common law long before the particular federal and state decision was made to add gates to the U. S. Highway 79 grade crossing.

As the Eighth Circuit correctly noted in this case, improving highway safety was the guiding purpose of all of the federal law on grade crossing warning devices. *Appendix A-5.* This Court began its analysis in *Easterwood* with the same point. The Federal Rail Safety Act, this Court noted, "was enacted in 1970 'to promote safety in all areas of railroad operations and to reduce railroad-related accidents, and to reduce deaths and injuries to persons. . . . ' " *Easterwood,* 113 S.Ct. at 1736 (quoting 45 U.S.C. §421, now found as amended at 49 U.S.C. §20101 (1994)). Pursuant to that congressional mandate, the Secretary of Transportation has determined the most effective and efficient means to improve safety: a systemic and uniform improvement program for grade crossing improvements directed by the States and guided by federal regulation. 23 C.F.R. §924 (1994); 41 Fed. Reg. 11,651 (proposed March 2, 1995).

This Court should grant certiorari in this case to ensure the effective operation of that regulatory scheme. There is no other way to ensure the investment of "grade crossing improvement funds where the most lives will be saved and the most injuries prevented." 41 Fed. Reg at

11,651, *Appendix E-14–E-15*. There is no other way to accomplish the Federal Rail Safety Act's goal of a nationally uniform law for railroad grade crossings.

CONCLUSION

The petition for writ of certiorari should be granted. When does federal regulation of warning devices at railroad grade crossings pre-empt a railroad's common law tort duty to identify an allegedly hazardous crossing and select and install additional warning devices? The traveling public and the railroads need a definitive answer from this Court.

Respectfully submitted,

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Appendices

Appendix A

United States Court of Appeals
for the Eighth Circuit

No. 94-1136EA

St. Louis Southwestern Railway Company, *Appellee*,
v.
Malone Freight Lines, Inc.; Quantum Services, Inc.,
Appellants,

Tammy Hibshman, as personal representative of the
Estate of Brian Hibshman, deceased, *Appellant*,
v.
St. Louis Southwestern Railway Company, doing business
as Cottonbelt Line, *Appellee*.

Appeal from the United States District Court
for the Eastern District of Arkansas

Submitted: September 15, 1994
Filed: November 4, 1994

Before FAGG, Circuit Judge, HEANEY, Senior Circuit Judge, and LOKEN, Circuit Judge.

FAGG, Circuit Judge.

On July 20, 1991, Brian Hibshman's tractor-trailer

collided with a St. Louis Southwestern Railway train at a train crossing on an Arkansas highway. Mr. Hibshman was killed and his widow, Tammy Hibshman, brought a wrongful death action against the Railway. The Railway sued the tractor's lessee, Malone Freight Lines, Inc., and the tractor's owner, Quantum Services, Inc., for damages to the derailed train and dislocated track. After the two cases were consolidated for trial, the Railway moved for summary judgment on the opposing parties' claims that the Railway was negligent in failing to provide adequate warning devices at the crossing and in failing to use reasonable diligence in implementing a federally approved upgrade plan at the crossing. The Railway argued these state common-law claims were pre-empted by a federal grade crossing regulation, 23 C.F.R. § 646.214(b)(3)-(4) (1993), issued by the Federal Highway Administration (FHA) under the Federal Railroad Safety Act of 1970 (FRSA), 45 U.S.C. §§ 421-447 (1988 & Supp. IV 1992), and the Highway Safety Act of 1973, 23 U.S.C. §§101-160 (1988 & Supp. V 1993). The district court granted the Railway's motion, holding the negligence claims were pre-empted under 23 C.F.R. § 646.214(b)(3)-(4). Mrs. Hibshman, Malone and Quantum (collectively the appellants) appeal. We reverse and remand.

As the parties recognize, this case is governed by the Supreme Court's decision in *CSX Transportation, Inc. v. Easterwood*, 113 S.Ct. 1732 (1993). Like our case, *Easterwood* arose from a fatal accident involving a train and a truck at a railroad crossing. *See id.* at 1736. The Supreme Court held federal law did not pre-empt the plaintiff's

state common-law claim that the railroad was negligent in failing to maintain adequate warning devices at the crossing. *Id.* The Court explained that federal regulations pre-empt a railroad's state common-law duties when the regulations cover the same subject matter as the plaintiff's state claim. *Id.* at 1737-38. After rejecting other alleged sources of pre-emption, the Court considered whether a state inadequate warning device claim could be pre-empted by 23 C.F.R. § 646.214(b)(3)-(4). *Easterwood,* 113 S.Ct. at 1740. This regulation names the devices that must be installed when federal funds participate in the installation of warning devices at a railroad crossing. *Id.* at 1741. The Court decided pre-emption can occur under 23 C.F.R. §646.214(b)(3)-(4) if federal funds participate in the installation of warning devices at a crossing. *Easterwood,* 113 S.Ct. at 1741.

In *Easterwood,* the Court held federal funds did not participate in the installation of warning devices at the crossing where the accident occurred, even though the state Department of Transportation planned to install a crossing gate, federal funds were set aside for the plan, and motion-detection circuitry necessary for the gate's operation was installed. *Id.* Because the city declined to approve a necessary street project, the gate was placed on a list of projects to be considered later and federal funds set aside for the gate were reallocated. *Id.* at 1741-42. The Supreme Court held the facts did "not establish that federal funds 'participate[d] in the installation of the [warning] devices' at [the crossing]. The only equipment installed was the motion-detection circuitry. Such circuitry

does not meet the definition of warning devices provided in 23 C.F.R. § 646.204(i) and (j) (1992)." *Easterwood*, 113 S.Ct. at 1741 (quoting 23 C.F.R. § 646.214[b][3][i]) (footnote omitted).

To decide whether the appellants' inadequate warning device claims are pre-empted under *Easterwood*, we must decide whether federal funds participated in the installation of a warning device at the crossing before Mr. Hibshman's accident. The parties do not dispute the facts bearing on this issue.

In the summer of 1989, the Arkansas Highway and Transportation Department (AHTD) inspected the train crossing and decided the eight-inch lenses on the existing flashing light signals should be replaced with twelve-inch lenses, and automatic crossing gates should be added. At the AHTD's request, the Railway installed the larger lenses within a week. The AHTD requested a preliminary engineering report and plan from the Railway, and the Railway submitted a plan several months later. After approving the plan, the state submitted it to the FHA for review. The FHA approved the plan in late June 1990. The next month, the AHTD issued a work order authorizing the Railway to proceed with installation. About a year later, the Railway began construction. Four days after construction began, Mr. Hibshman was killed at the crossing. Two other accidents occurred at the crossing before the Railway installed the gates in October 1991, about fifteen months after receiving the work order. The FHA later reimbursed the AHTD with federal funds for the

AHTD's payments to the Railway for the larger lenses, engineering work, and the gates' construction and installation.

The district court held the inadequate warning device claims were pre-empted by 23 C.F.R. § 646.214(b)(3)-(4) when the FHA approved the upgrade plan in June 1990. In the district court's view, FHA approval of the plan constituted participation of federal funds in the installation of a warning device at the train crossing within the regulation's meaning. It was significant to the district court that a work order was issued before the accident and that, more than a year later, the gates were installed and federal funds were paid. On appeal, the appellants contend federal funds did not participate in the gates' installation until after the accident, when the gates were actually installed. We agree.

The view that federal funds participate in installation when the FHA approves upgrade plans is contrary to *Easterwood.* Before the accident in *Easterwood,* federal funds had been allocated for the gate, and thus, the FHA had approved the upgrade plan. *See* 23 C.F.R. § 646.216(e) (1993). Rather than looking to federal approval or fund allocation as triggering pre-emption, the Supreme Court focused on the equipment installed at the crossing. Because the only equipment installed was circuitry, which was not a passive or active warning device as defined in 23 C.F.R. § 646.204(i)-(j), the Court held the claim was not pre-empted. *Easterwood,* 113 S.Ct. at 1741-42.

The Railway cites some district court cases and one court of appeals case in support of its view that the appellants' inadequate warning device claims are pre-empted. These cases are either factually distinguishable or contrary to *Easterwood*. *E.g.*, *Hatfield v. Burlington No. R.R. Co.*, 1 F.3d 1071, 1072 (10th Cir. 1993) (remanding for findings on whether, when, or how federal funds were committed to project), *on remand*, 848 F.Supp. 158, 159 (D. Kan. 1994) (claim pre-empted because FHA authorized preliminary engineering and promised funding before accident). The Railway also argues *Easterwood* is distinguishable because the plan to install the gate was shelved for later consideration in *Easterwood*, and in this case, the gates' installation was "certain." According to the Railway, *Easterwood* means pre-emption occurs when federal approval is granted, as long as the approval is eventually followed by installation and federal payment. In other words, the decisive act is installation, but then pre-emption is retroactive to the time of federal approval. We disagree with this interpretation.

The view that pre-emption runs from the time of federal approval is inconsistent with the FRSA's goal of promoting safety at railroad crossings. *See Easterwood*, 113 S.Ct. at 1736. Before pre-emption, the public is protected by a railroad's state common-law duty of care. After installation of federally mandated warning devices, the public is protected by those devices. A plan to install devices and federal approval of a plan do not protect the public, however. The Railway's interpretation that federal approval triggers pre-emption would leave the public un-

protected between the time of approval and the time the prescribed devices are installed and operating. This can be a substantial period of time. In this case, it was fifteen months. To encourage prompt installation of federally prescribed warning devices, a railroad's common-law duty of care must continue until those devices are installed.

Under *Easterwood*, the regulations and the public safety policy behind the FRSA, we hold pre-emption occurs when all the devices prescribed in the FHA-approved upgrade plan are installed and operating. *See Earwood v. Norfolk So. Ry. Co.*, 845 F.Supp. 880, 886-87 (N.D. Ga. 1993) (inadequate warning device claims are pre-empted by installation of devices, not be federal planning, prioritization, and contracting on project); *Carpenter v. Consolidated Rail Corp.*, 631 N.E.2d 607, 610 (Ohio 1994) (pre-emption occurs when federal funds have actually been committed and spent, and warning devices have been installed). Thus, although the larger flasher lenses were installed before Mr. Hibshman's accident, pre-emption would not have occurred until after the accident when the gates were installed and operating. Also, like the circuitry installed in *Easterwood*, we do not believe the exchange of a single component part of the lights in place before the upgrade was the installation of a warning device defined in 23 C.F.R. § 646.204(i)-(j).

The district court was concerned that if installation triggered pre-emption, then the Railway would be devastated at trial with evidence about the AHTD's crossing risk evaluations, the planned upgrade, and the federally

prescribed devices. This concern overlooks 23 U.S.C. § 409 (1988), however. As we recently explained, this statute prohibits admission of " 'reports, surveys, schedules, lists, or data compiled for the purpose of identifying, evaluating, or planning the safety enhancement of . . . railway-highway crossings [under 23 U.S.C. § 130].' " *Lusby v. Union Pac. R.R. Co.*, 4 F.3d 639, 641 (8th Cir. 1993) (quoting 23 U.S.C. § 409). Under § 409, the evidence presented at trial should be the same as if no upgrades had been planned. Without hearing the prohibited evidence, the jury will have to decide whether the crossing, as it existed at the time of the accident, was abnormally dangerous under Arkansas law.

We conclude the appellants' inadequate warning device claims are not pre-empted. Thus, as the appellants state in their reply brief, we need not consider their argument about their claim that the Railway failed to use reasonable diligence in implementing the upgrade plan. We reverse the district court's grant of summary judgment to the Railway and remand the state common-law inadequate warning device claims for further proceedings.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

Appendix B

In the United States District Court
Eastern District of Arkansas
Jonesboro Division

St. Louis Southwestern Railway Company, *Plaintiff*
v. J-C-91-136
Malone Freight Lines, Inc., et al., *Defendants*

Tammy Hibshman, *Plaintiff*
v. J-C-91-174
St. Louis Southwestern Railway Company, *Defendant*

Memorandum and Order

On October 14, 1993, the Court held a hearing on the Railway's motions for partial summary judgment with respect to the claim by the defendants in J-C-91-136 and the plaintiff in J-C-91-174 that the warnings at the railroad crossing at U.S. Highway 79-Proctor, Arkansas, were inadequate. At the hearing, the parties agreed that the following facts were undisputed:

> (1) to implement the Highway Safety Act and the Federal Railroad Safety Act, the Secretary of Transportation issued regulations adopting the "Manual on Uniform Traffic Control Devices for Streets and Highways," 23 C.F.R. § 655.601, *et seq.*, which specified the standards for crossing safety and the obligations of the states.

(2) The General Assembly of Arkansas responded by adopting the Manual by statute, Ark. Code Ann. § 27-52-104—106. On February 28, 1979, the Arkansas State Highway Commission, in whom the legislature vested authority over safety devices at railroad crossings, reaffirmed the state-federal partnership in railroad crossing safety by approving Minute Order 79-71. In that Minute Order, the Commission also adopted the Manual. In a more recent Minute Order, the Commission adopted the 1988 edition of the Manual.

(3) On August 29, 1989, an Arkansas Highway and Transportation Department diagnostic team assembled to review the existing active warning devices at the railroad crossing at U.S. Highway 79-Proctor, Arkansas. The diagnostic team recommended that gates and 12" flashing lights be installed.

(4) One aspect of the team's recommendations, viz., replacement of the existing 8" flasher lenses with 12" flasher lenses, was done by the railroad within a week of notification of the team's results.

(5) FHA approved the plan and cost estimates submitted to it by the AHTD in late June or early July of 1990.

(6) Subsequent to FHA approval, the AHTD, on July 5, 1990, issued a work order to the railroad to proceed with construction of the improvements.

(7) The fatal collision occurred on June 20, 1991.

(8) The work was completed and payment made therefor subsequent to the collision. Reimbursement occurred pursuant to the work order and covered, among other things, the cost of the new 12" lenses for the flashing lights.

The Court concluded that the inadequate warnings claims were pre-empted by the Secretary of Transportation's regulations on installation of warning devices[1] when the FHA approved the AHTD's upgrade plan and cost estimates in late June or early July of 1990. Accordingly, the Court granted the Railway's motions for partial summary judgment. To provide the parties and the Eighth Circuit with the Court's legal analysis on the pre-emption issue, the Court hereby reduces the analysis to writing.

The United States Supreme Court's decision in *CSX Transp. Inc. v. Easterwood*, ___ U.S. ___, 113 S.Ct. 1732 (1993), sets the standard which this Court must follow. In *Easterwood*, the United States Supreme Court held that in "projects in which federal funds participate in the installation of warning devices, the Secretary has determined the devices to be installed and the means by which the railroads are to participate in their selection." *Id.* at 1741. The Supreme Court determined that the Secretary's regulations concerning installation of warning

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[1] 23 C.F.R. §§ 646.214(b)(3) and (4).

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(5) FHA approved the plan and cost estimates submitted to it by the AHTD in late June or early July of 1990.

(6) Subsequent to FHA approval, the AHTD, on July 5, 1990, issued a work order to the railroad to proceed with construction of the improvements.

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[1] 23 C.F.R. §§ 646.214(b)(3) and (4).

devices therefore "cover the subject matter of state law, which, like the tort law on which respondent relies, seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings." *Id.*

The Supreme Court then considered whether federal funds participated in the installation of the warning devices at the Cook Street crossing in Cartersville, Georgia. The record revealed that in 1979-1980, the Georgia Department of Transportation (DOT) decided to install a crossing gate at the West Avenue crossing in Cartersville, but that the gate could not be installed without placing motion-detection devices at four adjacent crossings, including the Cook Street crossing. Subsequently, the DOT installed new circuitry at each crossing, and installed gates at West Avenue and each of the adjacent crossings, except Cook Street. Although funds were set aside for putting a gate at the Cook Street crossing, the plan for the gate was shelved and funds allocated for use in another project. On February 24, 1988, Thomas Easterwood was killed when a train owned by the appellant collided with his truck.

The Supreme Court held that the facts did not establish that federal funds participated in the installation of warning devices at Cook Street, finding that the only equipment installed at the Cook Street crossing was the motion-detection circuitry and that such circuitry did not meet the definition of warning devices as provided for in 23 C.F.R. §§ 646.204(i) and (j) (1992). *Id.* at 1741-42.

The precise issue this Court must resolve is whether federal funds participated in the installation of a warning device at the crossing at U.S. Highway 79-Proctor, Arkansas, prior to June 20, 1991, the date the Railway's train collided with the truck driven by Brian Hibshman. The Court finds that federal funds participated in the installation of a warning device when the FHA approved the upgrade plan and cost estimates submitted to it by the AHTD in late June or early July of 1990, and that this participation was "significant." *Hatfield v. Burlington Northern R. Co.*, 1 F.3d 1071, 1072 (10th Cir. 1993). In so holding, the Court finds it important that a work order was issued on July 5, 1990, prior to the collision, and that the upgrade was later implemented and funded.

In conclusion, the Court finds that inadequate warnings claim by the defendants in J-C-91-136 and the plaintiff in J-C-91-174 are pre-empted and grants the Railway's motions for partial summary judgment.

THEREFORE, the Court grants the Railway's motions for partial summary judgment.

IT IS SO ORDERED this 18th day of October, 1993.

JOHN F. FORSTER JR.
United States Magistrate Judge

Appendix C

United States Court of Appeals
for the Eighth Circuit

No. 93-1136EAJ

St. Louis Southwestern Railway Company, *Appellee*
v.
Malone Freight Lines, Inc., et al., *Appellants*

Order Denying Petition for Rehearing
and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. Judge Beam would grant the suggestion for rehearing en banc. The petition for rehearing by the panel is also denied.

The 28(j) citation received from the appellee shall not be filed pursuant to the direction of the court.

December 28, 1994

Order Entered at the Direction of the Court:
MICHAEL E. GANS
Clerk, U. S. Court of Appeals, Eighth Circuit

Appendix D

United States Court of Appeals
for the Eighth Circuit

No. 94-1136EAJ

St. Louis Southwestern Railway Co., *Appellee*
v.
Malone Freight Lines, Inc.;
Quantum Services, Inc., *Appellants*

Tammy Hibshman, etc., *Appellant*
v.
St. Louis Southwestern Railway, etc., *Appellee*

Appeal from the United States District Court
for the Eastern District of Arkansas

Appellant's motion to stay the mandate of this court is granted pending the filing of a petition for writ of certiorari with the United States Supreme Court.

The issuance of the mandate in this case shall be stayed to and including 2/6/95. If within that time there is filed with the Clerk of this court a certificate of notification by the Clerk of the Supreme Court that a petition for writ of certiorari has been filed, this stay shall continue until final disposition of the case by that court.

January 5, 1995

Order Entered at the Direction of the Court:
MICHAEL E. GANS
Clerk, U. S. Court of Appeals, Eighth Circuit

United States Court of Appeals
for the Eighth Circuit

Corrected Order

No. 94-1136EAJ

St. Louis Southwestern Railway Co., *Appellee*
v.
Malone Freight Lines, Inc., et al., *Appellants*

Appeal from the United States District Court
for the Eastern District of Arkansas

Appellant's motion to stay the mandate of this court is granted pending the filing of a petition for writ of certiorari with the United States Supreme Court.

The issuance of the mandate in this case shall be stayed to and including 3/28/95. If within that time there is filed with the Clerk of this court a certificate of notification by the Clerk of the Supreme Court that a petition for writ of certiorari has been filed, this stay shall continue until final disposition of the case by that court.

February 1, 1995

Order Entered at the Direction of the Court:
MICHAEL E. GANS
Clerk, U. S. Court of Appeals, Eighth Circuit

Appendix E

Federal Railroad Administration
Proposed Rules on the Selection
and Installation of Grade Crossing
Warning Systems

Federal Register, Vol. 60 No. 41
March 2, 1995, pp. 11649-11654

Department of Transportation
Federal Railroad Administration
49 CFR Part 234
(FRA Docket No. RSGC-6; Notice No. 1)

Summary: FRA proposes to prohibit railroads from unilaterally selecting and installing highway-rail grade crossing warning systems at public highway-rail crossings. FRA further proposes to require that railroads furnish state highway authorities with information necessary for state grade crossing project planning and prioritization purposes.

Dates: (1) Written comments must be received no later than May 16, 1995. Comments received after that date will be considered to the extent possible without incurring additional expense or delay.

(2) A public hearing will be held at 9:30 a.m. on May 9, 1995. Any person who wishes to speak at the hearing should notify the FRA Docket Clerk at least five

working days before to the hearing, by telephone or by mail.

Addresses: (1) Written comments should be submitted to the Docket Clerk, Office of Chief Counsel, FRA, 400 Seventh Street, SW., Washington, DC 20590. Persons desiring to be notified that their written comments have been received by FRA should submit a stamped, self-addressed postcard with their comments. The Docket Clerk will indicate on the postcard the date on which the comments were received and will return the card to the addressee. Written comments will be available for examination, both before and after the closing date for comments, during regular business hours in Room 8201 of the Nassif Building at the above address.

(2) A public hearing will be held in room 2230 of the Nassif Building, 400 Seventh Street, SW., Washington, DC[.] Persons desiring to speak at the hearing should notify the Docket Clerk by telephone (202-366-0628) or by writing to the Docket Clerk at the address above.

For Further Information Contact: Bruce F. George, Chief, Highway-Rail Crossing and Trespasser Programs Division, Office of Safety, FRA, 400 Seventh Street, SW., Washington, DC 20590 (telephone 202-366-0533) or Mark Tessler, Trial Attorney, Office of Chief Counsel, FRA, 400 Seventh Street, SW., Washington, DC 20590 (telephone 202-366-0628).

Supplementary Information: This NPRM clarifies the

respective responsibilities of railroads and state and local governments regarding the selection and installation of highway-rail grade crossing warning systems. This proposal is issued to eliminate confusion and uncertainty as to the role of railroads in the selection and installation process. FRA expects the proposed rules to "substantially subsume" the subject matter of railroads' selection and installation of highway rail grade crossing warning systems and as such will pre-empt state laws covering the same subject matter.

Background

Highway-rail grade crossings present inherent risks to users, including motorists, pedestrians, railroad passengers and railroad employees. Of the more than 168,000 public highway-rail grade crossings in the nation, only 28,100 are fully equipped with automatic lights, gates and bells; fewer than 1,000 of the 108,000 private crossings are so equipped. The vast majority of public crossings (and private crossings) are equipped with only passive warning devices such as crossbucks. Engineering improvements at individual crossings, education of the public, and enforcement of highway traffic laws have reduced accidents and casualties at highway-rail crossings. Since 1978, accidents and fatalities have decreased dramatically despite increased highway usage, stable rail traffic levels, and increased train speeds. However, the present loss of life, injuries and property damage are still unacceptable. Highway-rail collisions are the number one cause of death in the entire railroad industry, far surpassing em-

ployee or passenger fatalities. Additionally, the proportion of severe accidents (i.e., those likely to result in fatalities) is rising. Nearly 4,900 collisions occurred between highway users and on-track railroad equipment in 1993. More than 600 people were killed and over 1,800 were seriously injured in these collisions.

In 1973 Congress first established the Rail-Highway Crossing Program (section 130 program) to improve highway-rail crossing safety. Continuous federal funding since then has made more than $3 billion available in improvement funds, representing more than 90% of project costs under this program. Because highway-rail grade crossing safety is primarily achieved through highway traffic control, DOT's Federal Highway Administration (FHWA) has oversight responsibility for the program. See 49 CFR 1.48.

State Safety Prioritization Process

FHWA regulations provide uniform federal standards for all highway traffic control systems, including those at highway-rail crossings. The federal government, rather than dictating the specific type of warning system to be installed at each of the nation's 168,000 public grade crossings, has established the outline of the required planning and selection process. FHWA has adopted regulations governing the process by which states are to establish priorities for implementing highway safety improvement projects, including projects for elimination of hazards of highway-rail grade crossings.

FHWA's regulations detail the uniform planning process involved in selecting the crossings to be improved. (23 CFR Part 924.) The planning component of a state's highway safety improvement program is required to incorporate a process for collecting and maintaining a record of accident, traffic, and highway data including characteristics of both highway and rail traffic. The planning component must also contain a process for analyzing data to identify hazardous highway locations based on accident experience or accident potential as well as containing a process for conducting engineering studies of hazardous locations. Of vital importance in ensuring that limited funds are spent in a manner that will achieve the greatest safety return, a state's safety improvement program is required to have a process for establishing priorities for implementing highway safety improvement projects. That process must consider the potential reduction in the number and/or severity of accidents; the cost of the projects and resources available; the relative hazard of public highway-rail crossings based on a hazard index formula; on-site inspections of crossings; potential danger to large numbers of people at crossings used on a regular basis by passenger trains, buses, pedestrians, bicyclists or by trains and motor vehicles carrying hazardous materials; and other criteria as appropriate in each state. 23 CFR 924.9.

As a review of the planning and prioritization components shows, the process outlined above could only be carried out by an entity capable of gathering and analyzing all the needed data. A railroad has only data avail-

able [11,650] to it which is railroad specific: rail traffic volume, authorized speed, number of tracks, type of train control system, and projected changes in these areas. Even accident data available to a railroad are of uncertain benefit since they are limited to the experiences of that one railroad rather than compared and collated with similar data from other railroads in the state or even other railroads whose tracks are crossed by the same highway.

The federal government has recognized that individual entities such as railroads do not have the requisite analytical tools and information gathering ability to make the appropriate decisions regarding the most appropriate focusing of limited safety improvement funds. State agencies have the necessary analytical tools and information. It is therefore appropriate that they have the responsibility for the actual selection of specific crossings and the determination of the type of warning devices to be installed.

The Secretary, through FHWA, has also issued standards governing the form and placement of all grade crossing warning systems irrespective of whether federal funds are used in their installation. 23 CFR 646.214. FHWA's Manual on Uniform Traffic Control Devices (MUTCD), incorporated by reference into the Code of Federal Regulations (23 CFR 655.601), establishes "traffic control device standards for all streets and highways open to public travel, regardless of type or class or the governmental agency having jurisdiction." MUTCD 1A-2.

The MUTCD establishes uniform standards relating to design and placement of traffic control signs, pavement markings and automatic warning devices. These standards apply nationwide—even when the improvements have not been paid for with federal funds.

DOT Safety Initiatives

This proposed rule is but one component of a continuing DOT campaign to improve grade crossing safety. DOT's Grade Crossing Action Plan includes several initiatives that will aid in improving safety at grade crossings. This plan details six major Departmental initiatives encompassing 55 separate actions addressing highway-rail grade crossing safety and trespass prevention. These initiatives include: enhanced enforcement of traffic laws at crossings; enhanced rail corridor crossing reviews and improvements; expanded public education and Operation Lifesaver activities; increased safety at private crossings; improved data and research efforts; and prevention of rail trespassing.

A cornerstone of this grade crossing safety campaign is the closure and consolidation of little used and redundant crossings. It is generally acknowledged that there are too many highway-rail grade crossings in this country—there are not sufficient resources from any source or sources to provide full warning systems or grade separations at all of the nation's crossings. Too many crossings are equipped only with crossbuck warning signs. Elimination of poorly designed, less travelled, and redun-

dant crossings will clearly enhance the safety of the travelling public. FRA has thus been advocating consolidation and closure for a number of years. FRA's role of advocate reflects the fact that state and local governments have the authority to close and consolidate crossings just as they have authority to create crossings in connection with public road construction.

This rulemaking is one in a series of rules addressing the responsibilities of the various parties in this critical rail safety area. On September 27, 1994, FRA issued maintenance, inspection, and testing rules (59 FR 50086, September 30, 1994). Those rules for the first time impose specific responsibilities on railroads to maintain, inspect and test active highway-rail grade crossing warning systems. Additionally, FRA imposed on railroads the responsibility to take specified actions when grade crossing warning systems malfunction. The rules impose costs on railroads in addition to the more than $130 million they spend on crossing maintenance every year. The allocation of responsibility to railroads regarding grade crossing maintenance, inspection, and testing and response to malfunctions reflects reality—railroads are the appropriate party to perform these activities. They have the technical expertise and forces to perform the work. Safety is enhanced by such allocation of responsibility.

Similarly, responsibilities have been allocated between railroads and state and local agencies by the Congress in the Swift Rail Development Act of 1994 (Pub.L. 103-440). Section 302 of that act directs the Secretary of

Transportation to issue regulations requiring that a locomotive horn be sounded while each train is approaching and entering each public grade crossing unless certain supplementary safety measures are provided by the "appropriate traffic control authority or law enforcement authority responsible for safety at the highway-rail grade crossing." Congress has implicitly recognized that railroads have responsibility in areas over which they have control, such as sounding of horns, while state and local traffic control authorities have responsibility pertaining to those areas within their expertise and under their control, namely highway traffic control.

The NPRM

This NPRM would also define responsibilities in the grade crossing area. It defines the responsibility of railroads to provide information and assistance in those areas in which their expertise is paramount—railroad operations. Railroads would be required to provide appropriate state agencies information related to their operations and to participate with state or local diagnostic teams to help the state or local governmental body determine which crossings' warning systems should be upgraded and to what extent.

This allocation of responsibility to railroads is based on the recognition that state and local governmental bodies are the entities with the expertise and information to look at the entire picture (of which railroad traffic and plans are but one component); whether crossings

should be consolidated or closed; funding availability; funding constraints; local desires; area residential, commercial and industrial development plans; and highway traffic engineering demands and constraints. Consistent with that expertise and information base, state and local governmental bodies are the appropriate bodies to determine which, how, and when highway rail grade crossing warning systems should be upgraded. Because of the very high cost to install an automatic traffic control warning system at a grade crossing—more than $100,000 at a double track crossing—it is imperative that the limited safety funds, from whatever sources, available for crossing improvements be spent in a rational, uniform, and coordinated manner. The present system whereby states, pursuant to FHWA regulations, investigate, plan, and prioritize crossing improvements provides the needed uniformity and coordination to ensure that the crossings most in need of safety improvements are those that receive them. Grade crossing safety is best enhanced by such a program that provides for a systematic upgrading of traffic control devices at crossings that are truly needed pursuant to a prioritized schedule established by state authorities under uniform federal criteria. Such a program allows state highway officials the ability to respond to the concerns of the public in making grade crossing improvement decisions, [11,651] and allows available resources to be allocated to the grade crossing improvement projects yielding the highest safety returns. Simply stated, this will save more lives than if an equal amount of money were spent on upgrading crossings that statistically are not as dangerous.

In other, less frequent situations, a state agency, local body or state or local legislative body may, outside of the Federal-aid program, fund the upgrading of a warning system at a specific crossing or order a railroad to install or upgrade a warning system at its own expense. These proposed rules are not meant to prevent those governmental authorities from being involved in such activities. Although the selection decision in these situations may not be based on the selection and installation criteria established by FHWA and adopted by the state department of transportation or highway department, presumably the governmental body's selection decision is based on sound public policy and overall safety considerations derived from information available to the state.

Some state laws, generally predating the advent of the Federal Rail-Highway Crossing Program, impose a tort law duty upon railroads to maintain safe crossings. In some cases this duty has been interpreted to include a duty to select and install warning systems at hazardous crossings. While this system may have been appropriate in the past, when there was no systematic and uniform improvement program in existence, today the result is one of misallocation of scarce resources. This ad hoc system of grade crossing improvements, driven by tort law and individual jury awards, runs counter to the goal of a uniform national program based on planning and prioritization. These ofttimes arbitrary local requirements can result in the installation of grade crossing warning systems, not where research and data indicates they will do the most good, but where a judge or jury determined, after

the fact, that such a system should have been installed.

Jury verdicts based on common law standards are necessarily ad hoc, case-by-case judgments that are retrospective in nature. The duties now imposed upon railroads ad hoc in this manner are inconsistent with the command of Congress that "[l]aws, regulations, and orders related to railroad safety shall be nationally uniform to the extent possible." (49 U.S.C. 20106) These verdicts do not provide an appropriate mechanism for determining whether the crossing is needed in the first place, and if needed, what warning devices are appropriate. Neither do these verdicts provide an appropriate method for determining the order in which crossings would be equipped or upgraded to yield the greatest safety benefits. Moreover, these judgments divert resources from saving lives through investments in grade crossing warning devices to compensating those killed or injured in accidents or their survivors. This is sound public policy only when the railroad has breached a duty to them that it is appropriate for the railroad to have.

In this proposed rule, FRA is defining in a nationally uniform manner the safety duties railroads have in connection with the selection and installation of warning devices at grade crossings. Tort judgments in general certainly exert a salutary deterrent influence on behaviors that rational actors can avoid, but here that deterrent is distorted or diminished by the combination of (i) the lack of adequate funds, public or private, to improve all grade crossings to the desired level of safety, (ii) the focus of

tort cases on whether a railroad has satisfied its common law duties at the grade crossing in question without regard to its behavior concerning grade crossings in general, and (iii) large judgments for accidents at grade crossings of low relative hazard. As things now stand, a railroad that is responsibly investing its available funds for the improvement of grade crossings in the order and in the manner specified by the transportation authorities in the states it serves may be subjected to large tort judgments resulting from the relatively random occurrence of accidents at grade crossings of low hazard relative to those improved. The proposed regulations are meant to ensure that the present system is not compromised by state requirements that railroads select and install grade crossing improvements outside the coordinated and prioritized federal/state system already established.

The Supreme Court in a recent decision, *CSX Transportation, Inc. v. Easterwood*, (113 S.Ct. 1732 (1993)) held that legal duties imposed on railroads by a State's common law of negligence fall within the scope of the pre-emption provision of 49 U.S.C. 20106 (formerly § 205 of the Federal Railroad Safety Act (45 U.S.C. §434)). However, the Court held that pre-emption of such state laws will lie only if the federal regulations substantially subsume the subject matter of the relevant state law.

FRA expects the proposed rules will "substantially subsume" the subject matter of railroads' selection and installation of highway rail grade crossing warning systems and as such will pre-empt state laws covering the

same subject matter, regardless of whether Federal funding of improvements is involved at a particular crossing.

In *Easterwood*, the Court held that "for projects in which federal funds participate in the installation of warning devices, the Secretary has determined the devices to be installed and the means by which railroads are to participate in their selection. The Secretary's regulations therefore cover the subject matter of state law which, like the tort law on which respondent relies, seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings." 123 L.Ed.2d at 401.

The Department believes that the distinction in safety duties drawn in *Easterwood* depending upon whether or not improvements to a particular grade crossing were federally funded results in poor public policy that is likely to misallocate scarce funds for grade crossing improvements because railroads are given a powerful financial incentive either (i) to invest funds in improving crossings on some basis other than the relative hazard rankings established by state highway authorities or (ii), especially in the case of small railroads, to diminish investment in grade crossing improvements because they cannot tell where an adverse verdict may strike next and their net financial results may be better served by using the funds to pay judgments they are unable to avoid. Railroad and highway safety alike are best served by focusing the economic and legal incentives of everyone involved in the process to invest grade crossing improvement funds where the most lives will be saved and the most injuries

prevented. The proposed rule is intended to achieve that result.

If, as the Department has recommended in its Highway-Rail Grade Crossing Action Plan, state transportation authorities also begin evaluating the hazards of grade crossings on entire rail corridors, the proposed rule would accommodate improvements focused in that manner. That is simply another way for state transportation authorities to systematically evaluate the relative safety of highway rail grade crossings and to decide which improvements will yield the best safety results.

Moreover, highway rail grade crossing warning systems are devices to control motor vehicle traffic on highways. Government bodies responsible for [11,652] highways and motor vehicle safety are the appropriate decision makers to decide which devices should be installed on public highways and the order in which intersections should be improved.

Railroads should be responsible for providing information to help state highway authorities make those decisions and for helping to implement those decisions after they are made. In fulfilling the requirements of FHWA's Highway Safety Improvement Program (49 CFR Part 924), state agencies have a need for railroad information that might have an impact on the type of improvement appropriate to a particular crossing or that might affect the relative priority to be given in upgrading one crossing versus another. Such data include present

and projected rail traffic (both hazardous and non-hazardous materials), track configuration, signalling, and authorized train speed as well as other conditions affecting the crossing. Railroads have historically provided assistance to state agencies planning for grade crossing improvements. The proposal would codify railroads' present practice of providing information and assistance needed by those state agencies.

The proposal will not affect railroads' present obligations to maintain grade crossing warning systems. Indeed, as noted above, FRA's recently issued amendments to Grade Crossing Signal System Safety regulations codify specific maintenance, inspection, and testing requirements for grade crossing warning systems.

While this proposed rule prevents a railroad from unilaterally selecting and installing warning systems, it does not prevent a state agency from ordering a railroad to pay for all or part of grade crossing warning system on a non-Federal aid project. While FRA is philosophically opposed to the concept of a railroad being forced to pay for an upgrade to what is essentially a highway traffic control device for which it receives no net benefit (see 23 CFR 210(b)), FRA is not prepared at this time to issue regulations pre-empting the many state laws in this area.

Section-by-Section Analysis

§ 234.301 Railroad cooperation.

Paragraph (a) of this section requires that railroads cooperate with the appropriate state agency in furnishing information to enable the state to develop plans and project priorities for the elimination of hazards of highway-rail grade crossings. Railroad plans to increase traffic on a line or to upgrade track or signalling to enable increases in train speed, are important factors which states must take into consideration in determining their prioritization and plans. Similarly, state planners need information regarding railroad plans or projections regarding decreasing traffic volume. Railroads have generally provided such information on a voluntary and routine basis. This provision codifies the responsibility of a railroad to provide current and projected information which is uniquely available to the railroad. Without railroad information a state is unable to make the appropriate decisions to determine which crossings should be upgraded and with which type of warning systems. Many railroads already provide information such as current train counts, speeds, type and number of tracks and type of installed warning system to FRA or the state for inclusion in the DOT/Association of American Railroads National Highway-Rail Grade Crossing Inventory (Inventory) on file with FRA. Duplicate submissions to a state are not necessary under this rule inasmuch as Inventory data is routinely available to States.

Presently, information submissions by States and railroads to the Inventory are made on a voluntary basis. Comments are specifically invited regarding the advisability of making Inventory information submission mandatory.

This section also provides that a railroad need not submit proprietary data of a confidential nature to a state unless that information will be protected from disclosure. Such provision will ensure that railroads will not be penalized commercially by such regulatory compliance.

Paragraph (b) of this section requires that railroads provide appropriate engineering and other technical assistance to the state agency in designing and installing the warning system determined by the state to be appropriate to the particular crossing. In many instances, a railroad is the only party with the requisite technical expertise to assist the state in developing the engineering design for the crossing. This section recognizes that fact and therefore establishes a duty to assist in this area.

§ 234.303 Selection and installation of warning systems at public crossings.

Paragraph (a) of this section prohibits a railroad from unilaterally selecting or determining the type of grade crossing warning system to be installed at a public highway-rail grade crossing. Such a decision is more appropriately made by the state or local government. In some situations today, a railroad voluntarily contributes

the cost of installing a crossing warning system. In some cases, a railroad has voluntarily contributed all or part of a locality's required local share in order to enable a particular crossing to be improved with federal funds. The proposed rule is not meant to alter this practice of voluntary railroad involvement. Similarly, this rule is not meant to affect those situations in which a railroad improves a crossing at its own expense in order to secure the closure of another crossing. These railroad practices, unlike funding of projects outside of the state planning process, are supportive and consistent with the prioritization and planning process. Therefore, nothing in the proposal prevents a railroad from voluntarily contributing to the installation costs of warning devices installed pursuant to the state planning process.

Paragraph (b) addresses the installation of the warning system after the specific grade crossing and type of warning system has been selected. This paragraph provides that a railroad shall only install or upgrade a grade crossing warning system at a public highway-rail grade crossing pursuant to an order by, or agreement with, a state agency or other public body having authority to issue such order or enter into such agreements. The proposal provides that whenever such state agency or other public body determines that a particular grade crossing warning system should be installed at a particular highway-rail grade crossing, the railroad shall comply with any legally sufficient order, or in the case of federally funded grade crossing projects, enter into and perform an agreement for the installation or upgrade of that grade

crossing warning system with the state agency or other public body having jurisdiction. The rule does not require a railroad to provide the non-federal share of costs involved in federally-funded grade crossing improvement projects.

This section recognizes that since the warning system is, in many instances, tied into the railroad's track circuits and the railroad will maintain the system, the railroad is generally the most appropriate party to physically install the system. Under the present Federal-aid system, railroads are reimbursed for procurement and installation costs of the warning system. This paragraph recognizes the benefits of this process and only prohibits railroads from unilaterally installing grade crossing warning systems without state or local approval.

This section is not meant to prohibit a railroad's voluntarily contribution to costs of installation of a highway-rail grade crossing warning system. [11,653] Railroads have voluntarily contributed all or a portion of the non-Federal matching share required under Federal law for construction of grade crossing warning systems. FRA does not intend to prevent or discourage such contributions.

While FRA believes that railroads have many powerful incentives to continue their longstanding policy of voluntarily providing matching funds for federally funded grade crossing projects, comment is sought concerning whether this proposal will affect the level of rail-

road participation in such projects.

Paragraph (c) addresses railroad projects in which warning system improvements are only incidental to the railroad project. Some railroad projects, such as new track, upgraded track, or the installation of signal systems, may involve upgrading warning system circuits or the replacement of obsolete equipment with newer, more technologically advanced equipment. This rule is not intended to prohibit railroad's present practice of incidental upgrades.

Regulatory Impact

E.O. 12866 and DOT Regulatory Policies and Procedures

This proposed rule has been evaluated in accordance with existing policies and procedures, and is considered to be significant under DOT policies and procedures (44 FR 11034, February 26, 1979). This regulatory document was subject to review under E.O. 12866. FRA has prepared and placed in the rulemaking docket a regulatory evaluation addressing the economic impact of this rule. A copy of the regulatory evaluation may be inspected and copied in Room 8201, 400 Seventh Street, S.W., Washington, D.C., 20590.

In its regulatory analysis FRA posited that the costs and benefits of this proposed rule are not measurable at present, but that the benefits will equal or exceed the costs, because the function of this rule is to virtually

eliminate grade crossing selections and installations which do not require an analysis which considers costs and benefits.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.)* requires a review of rules to assess their impact on small entities. In reviewing the economic impact of the proposed rule, FRA has concluded that it will have a minimal economic impact on small entities. There is no direct or indirect economic impact on small units of government, businesses, or other organizations. Therefore, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the provisions of the Regulatory Flexibility Act.

Paperwork Reduction Act

The proposed rule contains information collection requirements. FRA is submitting these information collection requirements to the Office of Management and Budget for approval under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.).* The proposed section that contains information collection requirements is § 234.301. Persons desiring to comment on this topic should submit their views in writing to FRA (Ms. Gloria Swanson, RRS-21, Federal Railroad Administration, 400 Seventh Street, S.W., Washington, D.C. 20590) and to the Office of Management and Budget (Desk Officer, Regulatory Policy Branch (OMB No. 2130-AA92), Office and

Management and Budget, New Executive Office Building, 726 Jackson Place, N.W., Washington, D.C. 20530. Copies of any such comments should also be submitted to the Docket Clerk, Office of Chief Counsel, FRA, 400 Seventh Street, S.W., Washington, D.C. 20590.

Environmental Impact

FRA has evaluated these proposed regulations in accordance with its procedure for ensuring full consideration of the potential environmental impacts of FRA actions, as required by the National Environmental Policy Act and related directives. This notice meets the criteria that establish this as a non-major action for environmental purposes.

Federalism Implications

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that the proposed rule has sufficient federalism implications to warrant the preparation of a Federalism Assessment. A copy of the Federalism Assessment has been placed in the public docket and is available for inspection.

List of Subjects in 49 CFR Part 234

Railroad safety, Highway-rail grade crossings.

The Proposed Rule

In consideration of the foregoing, FRA proposes to amend Part 234, Title 49, Code of Federal Regulations as follows:

PART 234—[AMENDED]

1. The authority citation for Part 234 continues to read as follows:

Authority: 49 U.S.C. 20103, 20106, 20107, 20111, 20112, 20134, 21301, 21304, and 21311 (formerly Secs. 202, 208, and 209 of the Federal Railway Safety Act of 1970, as amended (45 U.S.C. 431, 434, 437, and 438, as amended)); 49 U.S.C. 20901 and 20102 (formerly the Accident Reports Act (45 U.S.C. 38 and 42); and 49 CFR 1.49 (f), (g), and (m).

2. Add a new "Subpart E—Selection and Installation of Grade Crossing Warning Systems," to read as follows:

Subpart E—Selection and Installation of Grade Crossing Warning Systems

Sec.
234.301 Railroad cooperation.
234.303 Selection and installation of grade crossing warning systems.

§ 234.301 Railroad Cooperation

(a) Railroads shall cooperate with the appropriate state agency in furnishing information to enable the state agency to develop plans and project priorities for the elimination of hazards of highway-rail grade crossings including, but not limited to grade crossing elimination, reconstruction of existing grade, separations, and grade crossing improvements. At the request of the appropriate state agency, a railroad shall provide information not already provided to the FRA or the state for inclusion in the DOT/Association of American Railroads National Highway-Rail Grade Crossing Inventory regarding railroad operations involving specific highway-rail grade crossings, including but not limited to: present and projected rail freight traffic (including transportation of hazardous materials); present and projected passenger traffic; present and projected track configuration and signalling; present and projected maximum authorized train speed; and other conditions which may affect the planning for, and prioritization of, crossing improvements. Nothing herein requires that a railroad provide to a state proprietary data of a confidential nature unless such information shall be protected from disclosure.

(b) Railroads shall provide appropriate engineering and other technical assistance to the state agency in designing and installing the warning system determined by the state to be appropriate to the particular crossing.

§ 234.303 Selection and installation of grade crossing warning systems.

(a) A railroad shall not unilaterally select or determine the type of grade crossing warning system to be installed at a public highway-rail grade crossing. [11,654]

(b) Subject to paragraph (c), a railroad shall only install or upgrade a grade crossing warning system at a public highway-rail grade crossing pursuant to an order by, or agreement with, a state agency or other public body having authority to issue such order or enter into such agreements. Whenever such state agency or other public body determines that a particular grade crossing warning system should be installed at a particular highway-rail grade crossing, the railroad shall comply with any legally sufficient order, or in the case of federally funded grade crossing projects, enter into and perform an agreement for the installation or upgrade of that grade crossing warning system with the state agency or other public body having jurisdiction. Nothing herein shall require a railroad to provide the non-federal share of costs involved in federally-funded grade crossing improvement projects.

(c) A railroad is permitted to upgrade, at its own expense, components of a public highway-rail grade crossing warning system when such upgrade is incidental to a railroad improvement project relating to track, structures or train control systems.

3. Amend Appendix A by inserting in numerical

order new entries to read as follows:

APPENDIX A TO PART 234.—
SCHEDULE OF CIVIL PENALTIES

Section	Violation	Willful violation
234.301 Railroad cooperation	$5,000	$7,500
§234.303 Selection and installation of grade crossing warning systems	5,000	7,500

Issued in Washington, D.C. on February 24, 1995.

JOLENE M. MOLITORIS
Administrator.

No. 94-1572

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,

Petitioner

v.

MALONE FREIGHT LINES, INC.,
QUANTUM SERVICES, INC. and
TAMMY HIBSHMAN, as the Personal Representative of
the Estate of Brian Hibshman, Deceased,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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19 pp

QUESTION PRESENTED

Whether Respondents' state common law claims and defenses that the grade crossing warning devices were inadequate were pre-empted by federal law when the Federal Highway Administration had approved plan and cost estimates to upgrade the warning devices at the crossing, even though the automatic gates with flashing lights required by the regulations were not installed or operating nearly one year later when the accident giving rise to this case occurred.

PARTIES TO THE PROCEEDING

All of the parties to the proceeding in the United States Court of Appeals for the Eighth Circuit are those set forth in the caption.*

*Malone Freight Lines, Inc. is a wholly-owned subsidiary of CRST International, Inc. which in turn is a closely held corporation. Quantum Services, Inc. is also a closely held corporation. There are no other parent or subsidiary corporations that are required to be disclosed under Supreme Court Rule 29.1.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,

Petitioner

v.

MALONE FREIGHT LINES, INC.,
QUANTUM SERVICES, INC. and
TAMMY HIBSHMAN, as the Personal Representative of
the Estate of Brian Hibshman, Deceased,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

This case arises from an accident on June 20, 1991 involving a tractor-trailer driven by Brian Hibshman and a train owned by St. Louis Southwestern Railway ("Railway") at a railroad crossing on U.S. Highway 79 near Proctor, Arkansas (the "Crossing"). Brian Hibshman was killed in the accident. The tractor was owned by Quantum Services, Inc. ("Quantum") and leased to Malone Freight Lines, Inc. ("Malone").

At the time of Brian Hibshman's fatal accident, the Crossing was not protected by automatic crossing gates with flashing lights. These warning devices are specifically required by 23 C.F.R. §646.214(b)(3), the federal regulation upon which Railway's claim of pre-emption is based. The size of the lens in the existing signals at the Crossing had been changed from eight inches to twelve inches pursuant to the recommendation of a diagnostic team in August of 1989, but the automatic crossing gates with flashing lights, which were also recommended by the diagnostic team in 1989, had still not been installed at the Crossing on the day of the fatal accident nearly two years later.

In the course of the litigation that followed, Tammy Hibshman, the widow of Brian Hibshman and the personal representative of his estate, Quantum and Malone (collectively, the "Respondents"), each asserted that Railway breached its duty under Arkansas law to provide adequate warning devices at the Crossing, the site of a number of prior accidents. Railway moved for summary judgment contending that these state law claims were pre-empted under 23 C.F.R. §646.214(b)(3). Despite the absence of the federally mandated warning devices at the Crossing, Railway argued, and the District Court found, that Railway's duty under Arkansas common law to provide adequate warning devices at the Crossing was pre-empted when the Federal Highway Administration (the "FHA") approved the upgrade plan for the Crossing in late June of 1990, nearly one year before the accident.

The Eighth Circuit, in a unanimous decision, ruled against Railway and reversed the District Court. Pet. App. A. The Eighth Circuit held that under this Court's decision in *CSX Transportation, Inc. v. Easterwood*, 113 S.Ct. 1732 (1993), and the language of the applicable regulations (23 C.F.R. §646.214(b)(3),(4)), federal funds did not participate in the

installation of automatic crossing gates with flashing lights until those gates were actually installed and operating. The Eighth Circuit therefore concluded that Respondents' inadequate warning device claims were not pre-empted.

REASONS FOR DENYING THE WRIT

Review should be denied in this case because *Easterwood* was correctly applied here and there is no conflict among the circuits which requires this Court to grant certiorari. Moreover, the issue is not of enough significance to warrant plenary review.

In the relatively short time since *Easterwood* was decided just two years ago, only a handful of decisions have even addressed the pre-emption issue, and so far the Eighth Circuit is the only federal court of appeals to have the benefit of a fully developed record on the upgrade activities at the crossing at the time of its decision. These circumstances suggest that it is premature for this Court to revisit the very narrow and often fact-bound issue of federal pre-emption at grade crossings so soon after the decision in *Easterwood*.

Perhaps even more importantly, the Federal Railroad Administration has recently proposed regulations specifically addressing the allocation of responsibility for the selection and installation of grade crossing warning devices. 41 Fed. Reg. 11,649 (March 2, 1995). If adopted, these regulations purport to resolve the legal issue Railway is currently asking this Court to address.[1] As a result, and contrary to Railway's contention, this case is a poor vehicle for this Court to use to explore the narrow issues presented here regarding federal

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[1] The proposed regulations, even if adopted, would not apply to pending cases, such as this one. *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988).

pre-emption at grade crossings when, except for a handful of pending cases, the regulatory process may well supersede any decision by this Court. Even if the proposed rules are not adopted, there will be ample opportunity for the Court, if it so chooses, to review this precise pre-emption issue after the question has been fully and finally examined by other courts. In short, all of the traditional factors considered by this Court suggest that certiorari should not be granted in this case.

A. There Is No Conflict Among The Circuits Which Requires This Court To Grant Certiorari.

Railway first contends that this case creates an improper conflict in the circuits which requires this Court's intervention, pointing to the Tenth Circuit's position in *Hatfield v. Burlington Northern Railroad Co.*, 958 F.2d 320 (10th Cir. 1992), *vacated and remanded*, 113 S.Ct. 1940 (1993), *on remand*, 1 F.3d 1071 (10th Cir. 1993). In fact, Railway asserts that the Eighth Circuit improperly "brushed this authority aside" without a sufficient explanation. Railway Pet. at 8.

In *Easterwood*, this Court quoted from the original *Hatfield* decision with disfavor and expressly rejected its broad view that railroads' responsibility for grade crossing safety was pre-empted by the "Federal Grade Crossing Safety Program" as set forth in 23 C.F.R §924 and 28 C.F.R. §655.603 et seq. (the "Federal Program"). 113 S.Ct. at 1739. Pursuant to the Federal Program, crossings are evaluated and upgrade priorities are set after consideration of the dangers posed by the various crossings. 113 S.Ct. at 1738. On remand, the Tenth Circuit, in a two page opinion, concluded that it had insufficient facts to rule on the pre-emption issue and remanded the case to the District Court. 1 F.3d at 1071-72. In the course of doing so, the Tenth Circuit renewed, in passing, its

broad interpretation of 23 C.F.R. §646.213(b)(3), a view rejected by this Court. 1 F.3d at 1072.[2]

The Tenth Circuit's comments are essentially dicta. More importantly, these comments ignore (a) this Court's analysis in *Easterwood*, which focused on whether warning devices had been installed at the crossing to determine if federal funds had participated in their installation, and (b) the fact that the same type of preliminary activity that the Tenth Circuit suggests can trigger pre-emption had actually occurred at the crossing in issue in *Easterwood* and yet, this Court expressly concluded that the plaintiff's inadequate warning claims were not pre-empted. The Eighth Circuit accurately grouped *Hatfield* among those cases which are "either factually distinguishable or contrary to *Easterwood*." Pet. App. A-6.

Railway also suggests that the Eighth Circuit's decision conflicts with a decision in the Seventh Circuit, citing the Seventh Circuit's recent decision in *Shots v. CSX Transportation*, 38 F.3d 304 (7th Cir. 1994). *Shots* is not in conflict with the Eighth Circuit's decision. In *Shots*, CSX railroad had installed reflectorized cross-bucks at 2,638 crossings, including the crossing where the accident in issue occurred. These installations were done pursuant to an agreement with the state which was funded by the federal government. The railroad argued that, since federal funds "participated" in the installation of these passive warning devices, the provisions of 23 C.F.R. §646.214(b)(4) (not 23 C.F.R. §646.214(b)(3)) clicked in, and any state law claim that it was negligent in not having additional warning devices at the

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[2] In *Armijo v. Atchison, Topeka and Santa Fe Railway Co.*, 19 F.3d 547, 551, *modified*, 27 F.3d 481 (10th Cir. 1994), also cited by Railway, the Tenth Circuit quoted from *Hatfield*, but again concluded that remand was necessary to determine whether pre-emption had occurred. Railway mistakenly fails to note that the opinion to which it cites was subsequently modified and the remand ordered.

crossing was pre-empted by the provisions of the regulation. The railroad's argument required the Seventh Circuit to resolve the issue whether federal pre-emption had occurred under subsection 4 of 23 C.F.R. §646.214(b), which provides that "the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency, and/or the railroad, *is subject to the approval of the FHWA.*" (emphasis added).

In stark contrast to the language of 23 C.F.R. §646.214(b)(***3***) (the regulation at issue in *Easterwood* and this case), federal approval of the warning devices at the crossings governed by 23 C.F.R. §646.214(b)(4) is specifically designated as the key event which triggers pre-emption. It is therefore understandable that the *Shots* court analyzed the existence of federal approval, ultimately concluding that the mere signing of the agreement did not constitute federal approval of the warning devices at the crossing.

The Seventh Circuit's analysis hardly contradicts this Court's analysis of 23 C.F.R. §646.214(b)(***3***) in *Easterwood.* Subsection 3 governs the warning devices required at crossings that feature multiple tracks, heavy traffic, or the like, and pursuant to its plain language, crossing gates with flashing lights are mandated. Pursuant to the express language of subsection 3, the pre-emption inquiry does not focus on federal approval. Instead, the inquiry is whether federal funds participated in the installation of the automatic crossing gates with flashing lights. Unlike subsection 4, subsection 3, does not contain the words "federal approval". Plainly, different types of crossings and different regulations are at issue in these cases.[3] See *Easterwood*, 113 S.Ct. at 1739, 1741. If anything,

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[3] In *Thiele v. Norfolk and Western Railway Co.*, 873 F.Supp. 1240 (N.D. Ind. 1994), noted at page 10 of Railway's Petition, the District Court overlooked the difference in the language of subsections 3 and 4, and

the difference in the language between the two regulations reaffirms that federal approval alone is insufficient to trigger pre-emption under 23 C.F.R. §646.214(b)(*3*). The *Shots* court itself recognized as much, noting that the issue in *Easterwood* and *Hatfield* was different than the one it confronted. 38 F.3d at 305-06.

B. The Eighth Circuit Correctly Applied This Court's Decision in Easterwood.

Railway also contends that certiorari is appropriate in this case because the Eighth Circuit misapplied *Easterwood*. Railway, not the Eighth Circuit, is in error.[4]

In *Easterwood*, this Court expressly rejected the argument that a railroad's state law duty to provide adequate warning devices was pre-empted by the adoption of the Federal Program. Id. at 1739-40. This Court then analyzed 23 C.F.R. §646.214(b)(3) and (4), and concluded that federal pre-emption does occur if federal funds participate in the installation of the specified warning devices. *Id.* at 1741. This Court reasoned that when these regulations are applicable to a particu-

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as a result, failed to recognize that the Seventh Circuit was resolving a different issue in *Shots* than had been resolved by the Eighth Circuit in this case. As a result, the District Court's conclusion that the Eighth Circuit's decision in this case was inconsistent with the Seventh Circuit's decision in *Shots* is wrong.

[4] Railway's position in its Petition for Certiorari is different from its position before the Eighth Circuit in its brief to the panel (although it did take this position after the fact in its petition for rehearing). Here Railway argues that federal approval alone is sufficient to trigger pre-emption. Railway Petition at 10. Previously, Railway argued that if the federal approval is "followed in due course by the installation and federal funding of the upgrade", then pre-emption occurs. Railway Eighth Circuit Brief at 7, 11-12, 27. As noted, the Eighth Circuit specifically and properly rejected that argument. Pet. App. A-6.

lar crossing, the types of warning devices are specifically mandated and therefore federal pre-emption occurs. *Id.*

This Court's application of 23 C.F.R. §646.214(b)(3) to the facts in *Easterwood* demonstrates that pre-emption is triggered by the actual installation of the federally mandated warning devices. The relevant facts were explained in detail in *Easterwood*. See 113 S.Ct. at 1740-1741. Based on those facts, this Court concluded that federal pre-emption had not occurred. *Id.* This Court's reasoning, which follows immediately after the detailed factual discussion, was as follows:

> These facts do not establish that federal funds "participate[d] in the installation of the [warning] devices" at Cook street. *The only equipment installed was the motion-detection circuitry.* Such circuitry does not meet the definition of warning devices.... *Id.* at 1741 (emphasis added).

As the Eighth Circuit correctly observed, "[r]ather than looking to federal approval or fund allocation as triggering pre-emption, the Supreme Court focused on the equipment installed at the crossing." Pet. App. A-5.[5]

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[5] The Eighth Circuit specifically observed that tying pre-emption solely to federal approval is inconsistent with the Federal Railroad Safety Act's goal of promoting safety at railroad crossings. As the Eighth Circuit explained:

> Before pre-emption, the public is protected by a railroad's state common-law duty of care. After installation of federally mandated warning devices, the public is protected by those devices. A plan to install devices and federal approval of a plan do not protect the public, however. The Railway's interpretation that federal approval triggers pre-emption would leave the public unprotected between the time of approval and the time the prescribed devices are installed and operating.

Pet. App. A-6,7. In contrast, a rule linking pre-emption to actual installa-

Despite this Court's analysis, Railway argues that the Eighth Circuit erred by making faulty assumptions about the presence of federal approval and federal funds in *Easterwood*. Railway's argument, in addition to being factually dubious, convincingly demonstrates that the actual installation of the federally mandated warning devices, not federal approval, is the critical pre-emption event. After this Court stated its ruling regarding the source of pre-emption, and its discussion turned to whether the regulation was applicable to the crossing in question, it did not mention the presence or absence of federal approval at the crossing. Instead, this Court applied the regulation by analyzing what equipment had actually been installed. If federal approval was the linchpin of the pre-emption analysis, surely this Court would have expressly stated so.[6] Therefore, contrary to Railway's contention, the *most*

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tion encourages railroads to promptly install the federally prescribed warning devices. The importance of such an incentive is vividly illustrated by the facts in this case. As one example, installation of the gates was delayed by five months because Railway did not maintain an inventory of essential component parts for signal boxes, even though it builds 85-100 of these boxes each year, and the same component parts are used in each box. Eighth Circuit Joint Appendix, p. 80.

[6] If federal funding and approval were not present in *Easterwood*, as contended by Railway, then this Court could have resolved that case simply by stating that state, not federal, funding and approval were involved. This Court had already carefully explained that despite the fact that the states have long had final authority for the installation of particular safety devices at grade crossings, this did not excuse a railroad from its common law duty to maintain a safe crossing. Id. at 1738 n.5, 1739. Therefore, this Court, by continuing its analysis past the existence of state involvement, clearly contemplated that federal approval and federal funds were involved at the Cook street crossing.

The arguments raised by the parties in *Easterwood* further support this point. The principal issue before both the district court and the Eleventh Circuit was whether pre-emption was triggered by the Federal Program. When the case was taken to this Court, the Solicitor General advocated

that can be derived from the silence as to federal approval is that it was not the pivotal event triggering pre-emption.

In any event, it is virtually certain that the Eighth Circuit's analysis of the existence of federal funding and federal approval was correct. Immediately following the foregoing analysis in *Easterwood*, this Court stated:

> Petitioner [the CSX railroad] nevertheless contends that the Cook Street crossing was part of a single project to improve the five Cartersville crossings, and that the regulations were applicable because federal funds participated in the installation of gates at the other four crossings. *Id.* at 1741-42.

Railway now contends that "[a]t no point, however, did the Supreme Court characterize the Cook Street crossing funds as 'federal' funds." Railway Pet. at 11. Even if this is in some sense literally correct, it is at best a highly tenuous interpretation. As the quoted language demonstrates, five adjacent crossings were involved in *Easterwood*, including the Cook street crossing, and funds were set aside. The upgrades were completed at the other four projects and, as the CSX railroad argued to this Court, were paid for with federal funds. *Id* at 1741-42. Under any normal reading of this language, it is read-

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the position ultimately adopted by this Court, namely that the "program" did not trigger pre-emption, but pre-emption did occur under 23 C.F.R. §646.214(b) if the crossing was *"improved with the use of federal funds"* and only where there was no showing of intervening "changed circumstances" or railroad negligence in the upgrade process. Solicitor General Br. at 24 & n.26 (emphasis added). The CSX railroad responded to the Solicitor General's argument by asserting, in part, that federal approval had surely been given in *Easterwood* because the federal funds set aside for the Cook street crossing could not have been set aside for the proposed upgrades without a federal determination that the proposed crossing gates were adequate. CSX Transportation, Inc. Reply Br. at 19, 20. *Cf.* at 21-22.

ily apparent that the funds set aside for the Cook street crossing were also federal funds.[7] Certainly this Court made no effort to distinguish the nature of the funds set aside for the Cook street crossing from the federal funds used to pay for the adjacent crossings—a point certainly worth making if such a distinction existed and was critical to this Court's analysis. Finally, as Railway acknowledges, the presence of federal funds to pay for a project is indicative of federal approval for the project. Railway Pet. at 12.

In short, Railway is wrong in its contentions that the Eighth Circuit erred in some of its statements regarding the existence of federal funds and federal approval in *Easterwood*. More importantly, however, these two factors were plainly not the critical events in this Court's analysis in *Easterwood* of what triggers federal pre-emption.[8]

C. The Recently Proposed Regulations Support The Denial Of Certiorari.

As noted, the Federal Railroad Administration has just

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[7] *See Earwood v. Norfolk Southern Railway*, 845 F. Supp. 880, 886 (N.D. Ga. 1993)("In *Easterwood* federal funds had been earmarked for the signals at the intersection but later reallocated"). See also the syllabus to *Easterwood* ("federal funds allocated for the project diverted elsewhere.") 113 S. Ct. at 1735.

[8] Railway also states that the Eighth Circuit made other errors of law, arguing that the replacement of larger lenses at the Crossing constituted the installation of an active warning device. Railway Pet. at 12.n.4. The modification of an existing warning device is not the same as the installation of a new active warning device. Pet. App. A-7. Moreover, the warning devices mandated by 23 C.F.R. §646.214(b)(3) are "automatic gates with flashing light signals." As the Eighth Circuit correctly explained, "we hold preemption occurs when *all the devices prescribed in the FHA-approved upgrade plan are installed and operating.*" *Id.* (emphasis added). Railway of course had failed to install these devices by the time Brian Hibshman was killed.

proposed regulations that specifically address the allocation of responsibility for grade crossing upgrades. In essence, these regulations propose that the existence of the Federal Program, and a railroad's participation therein, should pre-empt the state law duties imposed on railroads to provide adequate warning devices at grade crossings. These regulations therefore purport to effectively overturn this Court's decision in *Easterwood* which, as noted, concluded that a railroad's state law duties could compliment the Federal Program's procedures for evaluating, rating and upgrading grade crossings.

Railway offers a drawn out argument on how these proposed regulations suggest that the Eighth Circuit erred and why certiorari should be granted to remedy this error. Railway Pet. at 13-18.[9] Despite these efforts, the actual implication of the proposed regulations on whether to grant certiorari in this case is plain: they strongly counsel against granting certiorari.

If the proposed regulations are adopted, then the issue in this case, whether federal pre-emption occurs only upon actual installation of the federally mandated warning devices, will have ostensibly been answered by the regulations for all future cases and the focus will turn to the legality of those regulations and their correct application. Any decision by this Court in the interim will impact only a handful of cases which are currently pending. Alternatively, if the proposed regulations are not adopted, other courts will have an opportunity to consider the pre-emption issue on fully developed factual records. If the conflict urged by Railway does in fact emerge in subsequent cases, this Court (if it decides the issue merits

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[9] Railway makes the remarkable assertion that in *Easterwood,* this Court "considered briefly" whether the Federal Program triggered pre-emption. Pet. App. A-7. The pre-emptive effect of the Federal Program was of course a central focus of the analysis. See 113 S.Ct. at 1737-40.

review) will then have the benefit of those courts' analysis and the issue will have been fully framed. Given the role this Court should properly play in our appellate system and the competing demands on the Court's time and resources, it makes little sense to grant certiorari in this type of situation where the Court's decision may have such little precedential value. It makes much more sense for this Court to wait and see whether the proposed regulations are adopted before it decides whether it needs to revisit the very narrow issue of federal pre-emption at grade crossings raised in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

SAINT LOUIS SOUTHWESTERN RAILWAY CO.,
Petitioner,

v.

MALONE FREIGHT LINES, INC., et al.,
Respondents.

On Petition For A Writ Of *Certiorari* To The United States Court Of Appeals For The Eighth Circuit

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BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITION

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April 24, 1995

QUESTION PRESENTED

Whether state-law negligence claims alleging a railroad's duty to upgrade traffic control devices at a rail-highway grade crossing are preempted by the Rail Safety Act of 1970 and regulations issued under the Grade Crossing Program of the Highway Safety Act, where it is undisputed that prior to a collision there was an ongoing FHWA-approved project for the installation of traffic control devices in which federal funds were participating?

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In The
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v.

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Respondents.

On Petition For A Writ Of *Certiorari* To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF PETITION

This brief of the Association of American Railroads is filed with the consent of the parties, the letters expressing such consent having been filed with the Clerk of the Court.

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae Association of American Railroads (AAR), is a voluntary, non-stock, nonprofit, incorporated trade association. Its members constitute the vast majority of the nation's freight railroads, operate approximately 76 per cent of the total line-haul mileage, and produce some 94

per cent of freight revenues. Amtrak, which carries virtually all intercity rail passenger traffic, is also a member of AAR. AAR appears before courts, agencies and the Congress on matters of concern to the railroad industry.

Safety at rail-highway grade crossings is a vital concern of AAR and its members, who operate over more than 150,000 miles of track, and over most of the 170,000 rail-highway grade crossings in the United States. Since the enactment of the Federal Rail Safety Act of 1970 and the adoption of the federal Grade Crossing Program,[1] AAR members have actively participated in that program, which has proven to be one of the most successful highway safety measures ever enacted.[2] AAR has a strong interest in maintaining its success, as well as the uniformity and certainty it has engendered.

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[1] 49 U.S.C. § 20101, *et seq.* (as amended, original version at 45 U.S.C. § 421, *et seq.*) (FRSA). The federal Grade Crossing Program emanated from a later amendment to the Highway Safety Act, wherein 23 U.S.C. § 130(d) was added. The Secretary of Transportation's role under FRSA and the Highway Safety Act is implemented through the Federal Railroad Administration and the Federal Highway Administration. Therefore, the Secretary will be referred to either as USDOT, FHWA, or FRA.

[2] "The federal Grade Crossing Program has been one of the most successful highway safety programs ever enacted, reducing fatal and non-fatal accident rates by 88% and 62%, respectively, and saving more than 6,400 lives and preventing more than 26,500 ... injuries." Report of the Secretary of Transportation to the United States Congress, *The 1991 Annual Report on Highway Safety Improvement Programs* (April 1991), at IV-5. This dramatic reduction in accidents has continued. USDOT now estimates that more than 7,200 fatalities and 31,000 nonfatal injuries have been prevented. Report of the Secretary of Transportation to the United States Congress, *The 1993 Annual Report on Highway Safety Improvement Programs* (April 1993), at IV-5.

REGULATIONS INVOLVED

23 C.F.R. § 924.5 Policy.

Each State shall develop and implement, on a continuing basis, a highway safety improvement program which has the overall objective of reducing the number and severity of accidents and decreasing the potential for accidents on all highways.

23 C.F.R. § 924.9 Planning.

(a) The planning component of the highway safety improvement program shall incorporate:

(1) A process for collecting and maintaining a record of accident, traffic, and highway data, including, for railroad-highway grade crossings, the characteristics of both highway and train traffic;

(2) A process for analyzing available data to identify highway locations, sections and elements determined to be hazardous on the basis of accident experience and accident potential;

(3) A process for conducting engineering studies of hazardous locations, sections, and elements to develop highway safety improvement projects as defined in 23 U.S.C. 101(a); and

(4) A process for establishing priorities for implementing highway safety improvement projects, considering:

(i) The potential reduction in the number and/or severity of accidents,

(ii) The cost of the projects and the resources available,

(iii) The relative hazard of public railroad-highway grade crossings based on a hazard index formula,

(iv) Onsite inspection of public grade crossings,

(v) The potential danger to large numbers of people at public grade crossings used on a regular basis by passenger trains, school buses, transit buses, pedestrians, bicyclists, or by trains and/or motor vehicles carrying hazardous materials, and

(vi) Other criteria as appropriate in each State.

(b) In planning a program of safety improvement projects at railroad-highway grade crossings, special emphasis shall be given to the legislative requirement that all public crossings be provided with standard signing.

(c) The planning component of the highway safety program may be financed with funds made available through 23 U.S.C. 402, 307(c), and, where applicable, 104(f).

23 C.F.R. § 924.11 Implementation.

(a) The implementation component of the highway safety improvement program in each State shall include a process for scheduling and implementing safety improvement projects in accordance with (1) the procedures set forth in 23 CFR

part 630, subpart A (Federal-Aid Program Approval and Project Authorization) and (2) the priorities developed in accordance with § 924.9. The States are encouraged to utilize the timesaving procedures incorporated in FHWA directives for the minor type of work normal to highway safety improvement projects.

[subsections (b) - (g) omitted.]

SUMMARY OF ARGUMENT

There are special and important reasons why this case should be reviewed by this Court. In *CSX Transportation, Inc. v. Easterwood*, ___ U.S. ___, 113 S.Ct. 1732 (1993), this Court held state-law tort claims are preempted under Section 205 of FRSA[3] by regulations issued under the Highway Safety Act[4] which are applicable where federal funds participate in the installation of grade crossing traffic control devices. The decision below involves an important question not reached in *Easterwood* - at what point in a federal highway project does preemption occur? The Petition demonstrates that a clear conflict exists between the decision below and decisions by other United States courts

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[3] 49 U.S.C. § 20106 (original version at 45 U.S.C. § 434).

[4] 23 C.F.R. § 646.214(b), issued pursuant to 23 U.S.C. § 130(d).

of appeals,[5] amply satisfying the criteria governing review on *certiorari* under Rule 10.1(a).

This conflict produces confusion and a serious practical problem of vital concern to railroads, namely the degree to which their legal liability may hinge on the timing of federally funded grade crossing projects. This problem is particularly troublesome in that the states and FHWA control the timing of such projects, including provisions for *interim* safety measures, from their inception to completion.

The ramifications of the decision below on highway safety present an additional consideration of great importance. The decision below runs counter to a basic principle which underlies the federal Grade Crossing Program - - that public safety is best served by a nationally uniform system of improving the most hazardous crossings first. To this end, federal regulations mandate that state agencies set priorities and implement grade crossing improvement projects on the basis of relative hazard rankings under a hazard index formula adopted by the state. These regulations also set forth procedures for expedited completion of projects if deemed necessary.

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[5] The decision below is in direct conflict with *Hatfield v. Burlington Northern Railroad Co.*, 1 F.3d 1071 (10th Cir. 1993), *on remand*, 848 F.Supp. 158 (D.Kan. 1994); and *Armijo v. Atchison, Topeka and Santa Fe Railway Co.*, 19 F.3d 547 (10th Cir. 1994) (preemption occurs upon significant commitment of federal funds to grade crossing improvement project). It conflicts with the *rationale* of *Shots v. CSX Transportation, Inc.*, 38 F.2d 304 (7th Cir. 1994). The decision below is in agreement with the decision in *Carpenter v. Consolidated Rail Corp.*, 69 Ohio St.3d 259, 631 N.E.2d 607 (Ohio 1994) (preemption occurs when federal funds actually spent, and signals installed and operating).

The decision below undermines the principles embodied in the federal Program by sanctioning collateral attacks on such relative hazard rankings and the timing of improvement projects through state tort law, which relies on *post hoc* inquiries based on subjective negligence standards. The incentives created by this ill-advised approach make it difficult for railroads - - who play an important, though limited role in the federal Program - - to act consistently with the Program's requirements.

ARGUMENT

I.

IMPOSING RESPONSIBILITY ON RAILROADS FOR TIMING FOLLOWING FHWA PROJECT APPROVAL IS INCONGRUOUS WITH THE STATUTE AND FEDERAL PROGRAM

The decisions holding preemption is triggered by FHWA approval of federal funding are in harmony with the statutory scheme of the Federal Highway Act, since FHWA approval marks the birth, or "federalization" of a grade crossing improvement project. FHWA approval constitutes a commitment of federal funds under 23 U.S.C. § 106(a), which provides that such approval is deemed a binding contractual obligation of the United States to reimburse States and railroads for project costs.[6] However, the

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[6] This "deemer" provision was enacted to allow acceleration of projects under the Highway Safety Act. *See, State of Maine v. Goldschmidt*, 494 F.Supp. 93 (D.Me. 1980). Thus, "[o]bligation is the key step because obligated funds are considered 'expended' even though no cash is transferred." *State of Tennessee Ex Rel. Leech v. Dole*, 567 F. Supp. 704, 711 (M.D.Tenn. 1983).

holding below that railroads may, under state law, be responsible, in the absence of a state or FHWA time limit, for project delays following FHWA approval to completion of the project is incongruous with the statute and the Grade Crossing Program regulations, which vest total control over the timing of a project in the states and FHWA.

Projects proceed at a pace dictated by state and FHWA requirements. Typically, state-railroad project agreements contain a provision prohibiting commencement of work until the railroad is notified by the state to do so pending the FHWA approval process. Following approval by FHWA, the state notifies the railroad to proceed. *See, e.g., Thiele v. Norfolk and Western Ry.*, 873 F.Supp. 1240, 1245 (N.D.Ind. 1994). The regulations at 23 C.F.R. §§ 646.218 and 646.219 set forth simplified/alternate procedures for accelerating grade crossing improvements where a project is time-sensitive.[7]

However, the simplified/alternate procedures were not utilized by the state in the case at bar. Instead, the project followed the detailed procedures set forth in 23 C.F.R. § 646.216, which lists numerous requirements prior to approval or implementation of a project. Those provisions preclude, in the absence of FHWA authorization, advertising the physical construction for bidding or

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[7] 23 C.F.R. § 646.218(e) provides that work programmed and authorized under this procedure should include only that which can reasonably be expected to reach the construction stage within one year, and be completed within two years after the initial FHWA authorization date. There can be considerable time savings in this procedure, since 23 C.F.R. 646.218(d) provides that FHWA may authorize construction, including acquisition of warning device materials, with the condition that work at a particular location will not be undertaken until FHWA approves the final plans and specifications.

proceeding with railroad work until certain items have been accomplished in connection with the state's application. In the case at bar, almost a year elapsed between the recommendation of the diagnostic team and FHWA approval of the project. Notwithstanding this delay, neither the state nor FHWA notified the railroad the project was to proceed on an expedited basis, nor did either agency specify a date by which the project was to be completed.

In some cases, projects may be delayed when FHWA authorizes federal funding for pre-engineering work by a railroad in order to obtain complete design and plan drawings prior to its approval of a proposed project. *See, e.g., Hatfield v. Burlington Northern Railroad Co.*, 848 F.Supp. 158 (D.Kan. 1994).[8] These, as well as other delays, result from various requirements of related regulations, which in general restrict federal reimbursements to states for railroad work to "eligible costs," a condition of which is that they be incurred subsequent to the date of FHWA authorization. *See*, 23 C.F.R. § 140.904(b).

Project delay does not end there, since 23 C.F.R. § 924.11 requires that project scheduling and implementation be done in accordance with the priorities adopted by the state under 23 C.F.R. § 924.9, as will be discussed in further detail in the following section.

The decision below creates a serious practical problem for railroads. It exposes them to state-law liability for claims related to the timing of federally funded grade crossing projects, when the preemptive federal regulations

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[8] On remand ordered in *Hatfield v. Burlington Northern Railroad Co.*, 1 F.3d 1071 (10 Cir. 1993).

vest exclusive control over project timing in the states and FHWA.

II.

THE DECISION BELOW RUNS COUNTER TO THE BASIC PRINCIPLE OF SETTING SAFETY DRIVEN PRIORITIES UPON WHICH THE FEDERAL GRADE CROSSING PROGRAM IS BASED

The decision below runs counter to the basic principle which underlies the success of the federal Grade Crossing Program - that public safety is best served by allocating resources to improve the crossings determined to be most hazardous ahead of those determined to be less hazardous. In this regard, 23 C.F.R. § 924.9(a)(4)(iii) is clear in its requirement that state agencies must set priorities and implement grade crossing improvement projects on the basis of relative hazard rankings under a hazard index formula adopted by the state. 23 C.F.R. § 924.11 is equally clear in requiring that the states schedule improvement projects in accordance with the priorities developed under § 924.9. Because of these requirements, a given crossing can neither be planned nor scheduled for improvement until it qualifies on the basis of its relative hazard ranking.[9]

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[9] An illustrative priority hazard indexing system is New Mexico's "5-year plan," discussed in the trial court's decision in *Armijo v. Atchison, Topeka and Santa Fe Ry. Co.*, 754 F.Supp. 1526, 1529-30 (D.N.Mex. 1990), *rev'd and remanded*, 19 F.3d 547 (10th Cir. 1993), *as modified*, 27 F.3d 481 (10th Cir. 1994). From a master list of grade crossings, those ranked most hazardous are placed on a 5-year improvement list, and when by virtue of its ranking a crossing is the next to be upgraded, the FHWA approval process is begun by the State DOT. For a general overview of Minnesota's similar system, *see*, *McEwen v. Burlington Northern R. Co.*, 494 N.W.2d 313, 315 (Minn.App. 1993).

While each state is free to tailor its own formula to suit its particular needs,[10] significantly, the required use of hazard ranking indexes as the basis for scheduling projects introduced a new approach. The Program abandoned the old concept of determining hazard merely on the basis of prior accidents at a crossing. Instead, the focus was to include an assessment of a crossing's future accident potential: "FHWA considers that reducing the potential for accidents is the most important aspect of the safety improvement program, and has strengthened the wording in the final rule to make this point unquestionably clear." 44 Fed. Reg. 11543 (March 1, 1979), at 11544.

Thus, implicit in every notification by a state agency that FHWA has approved a federally funded grade crossing project is the understanding that the subject crossing has been determined by the state to be less hazardous (*i.e.*, has a lower priority) than those crossings previously scheduled for improvement, and more hazardous than those awaiting scheduling. The Program has the flexibility to change that assumption and can either direct a project be expedited ahead of some or all previously scheduled projects, or can direct *interim* safety measures when necessary.[11]

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[10] States use different hazard indexing formulae, which usually incorporate different factors, or assign different weight to the same factors, depending on considerations of terrain, crossing density, or other factors. The complexities involved in the five formulae in common use by States (*e.g.*, Peabody-Dimmick, New Hampshire Index, NCHRP 50, USDOT Accident Prediction, and Florida DOT Model) are described in USDOT's Rail-Highway Grade Crossing Handbook, (2nd Ed. FHWA-TS-86-215, 1986), Sec. III "Assessment of Crossing Safety and Operation," at pp. 63-78.

[11] Here, the crossing had active devices (flashers) and the diagnostic team recommended they be replaced with larger lenses, which

(continued...)

The decision below, allowing a state-law based collateral attack on the priority to be afforded to an improvement project, forces railroads to make a Hobson's choice - - whether to undertake projects in the order adopted by the state agency, or whether, based on sheer guesswork, to expedite projects at less hazardous crossings ahead of projects at more hazardous crossings. There is no middle ground, for this is a classic "robbing Peter to pay Paul" situation - - for where there are multiple ongoing improvement projects, one cannot be expedited without affecting others. If railroads were to unilaterally divert their engineering resources, materiel or labor to crossings of lower priority, the result is that one or more crossings of higher priority would be delayed. If an accident were to occur at a more dangerous crossing because of that delay, a railroad would be liable for its unilateral departure from the state's priority order, also risking the additional threat of punitive damages for its alleged recklessness for doing so.

Thus, the decision below undermines the principles embodied in the federal program by sanctioning collateral attacks under state tort law on the federally mandated

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[11](...continued)
was done immediately. The state considered, but did not deem warning lights in advance of the crossing to be necessary. An active advance warning sign (AAWS) consists of one or two 8" yellow hazard identification beacons mounted above (or above and below) standard railroad advance warning signs located well in advance of the crossing which begin flashing at, or prior to, the time when the red flashers at the crossing begin flashing. *See*, USDOT Rail-Highway Grade Crossing Handbook, *supra*, at 114-15. Other *interim* measures were suggested at the time for crossings being upgraded from passive to active devices. For example, ¶ 8B-9 of the U.S. DOT Manual For Uniform Traffic Control Devices (1988) (No. FHWA-SA-89-066) authorized "STOP" signs in certain circumstances.

relative hazard rankings. Permitting such attacks jeopardizes the integrity of the program, which is designed to ensure that crossing hazards are determined by state authorities on the basis of a rational system of hazard indexing, and not on the basis of a common law *post hoc* analysis which focuses only upon a single crossing, based on entirely differing standards historically used in determining negligence.

CONCLUSION

On the basis of the foregoing, *amicus curiae* Association of American Railroads respectfully submits that the petition for a writ of *certiorari* to review the judgment of the Court of Appeals for the Eighth Circuit in this case should be granted.

Respectfully submitted,

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